ATTORNEY GRIEVANCE COMMISSION OF MARYLAND	*	IN THE COURT OF APPEALS OF MARYLAND
Petitioner,	*	
v.	*	Misc. Docket AG No. 59 September Term, 2020
HANS BRUNO MILLER	*	In the Circuit Court for Montgomery County
Respondent.	*	No. 484418-V
	*	

OPINION

This matter came before the Court for trial on June 14, 15, 16, and 17, 2021. At the conclusion of the evidence, the Court requested that the parties submit proposed Findings of Fact and Conclusions of Law, and they have done so.

Upon consideration of the evidence presented and the arguments of counsel, as well as each party's proposed Findings of Fact and Conclusions of Law, the Court makes the following findings of fact and conclusions.

PROCEDURAL BACKGROUND

On January 4, 2021, the Attorney Grievance Commission ("Petitioner") of Maryland filed a Petition for Disciplinary or Remedial Action in the above captioned matter. The matter was docketed in the Court of Appeals as Miscellaneous Docket AG No. 59, September Term, 2020. The Respondent filed a redacted Answer on February 23, 2021, and an Answer on March 12, 2021.

On January 4, 2021, the Court of Appeals issued an Order directing that the allegations in the above-captioned matter be heard and determined by the undersigned Judge of the Circuit Court for Montgomery County.

The Respondent was served on February 9, 2021 and filed his Answer on March 23, 2021.[1]

Trial was conducted on June 14-17, 2021. The Petitioner alleged violations of the following Arizona Rules of Professional Conduct ("AZRPC"):

Rule 1.1	Competence
Rule 1.3	Diligence
Rule 1.4	Communication
Rule 3.3	Candor Towards the Tribunal
Rule 3.4	Fairness to Opposing Party and Attorney
Rule 3.8	Special Responsibilities of a Prosecutor
Rule 4.1	Truthfulness in Statements to Others
Rule 8.4	Misconduct

[1] On February 23, 2021, the Respondent filed a redacted Answer and Motion for Protective Order. On March 10, 2021, the Petitioner filed a Response to the Respondent's Motion for Protective Order. On March 12, 2021, this Court granted the Respondent's Motion for Protective Order and permitted the Respondent to disclose client confidences as necessary to defend this disciplinary matter. On March 12, 2021, the Respondent filed an unredacted Answer to the Petition.

At trial the Court admitted Petitioner's Exhibits1-92 and Respondent's Exhibits 300, 303-307, 309, 312-313, 315-316, 318-334, 336-344, 346, 349-351, 355, 368, 373, 393, 400, 425-337, 439-441, 443 and 445. The Petitioner called Diego Rodriguez, Esquire, Debra Vainio, Teresa Wallbaum, Esquire, and Sergeant Michelle Vasey as witnesses. In addition to testifying on his own behalf, the Respondent called Keith Vercauteren, Esquire, and Shari Wilson, Esquire, as fact and character witnesses. The Respondent called Dr. Christiane Tellefsen as an expert witness in forensic psychiatry. The Respondent also called Robert Baron, Medford Campbell III, Douglas Belote, The Honorable Barbara Kerr Howe, Paul Stancil, Mary Rosewin Sweeney, Elizabeth Newhoff, Wayne Raabe, Esquire, and Emmett Davitt, Esquire, as character witnesses.

STANDARD OF REVIEW

The Petitioner in this matter has the burden of proving, by clear and convincing evidence, the averments of the petition. The Respondent has the burden of proving an affirmative defense or a matter of mitigation or extenuation by a preponderance of the evidence. Maryland Rule 19-727(c); *see Attorney Grievance Comm'n v. Bakas*, 322 Md. 603, 589 A.2d 52, *modified*, 323 Md. 395, 593 A.2d 1087 (1991) (holding that the defense of the respondent's position, including whether mitigation circumstances have been shown must be proven by a preponderance of the evidence).

The Court makes the following Findings of Facts and Conclusions of Law. All findings of fact are by clear and convincing evidence unless otherwise indicated.

FINDINGS OF FACT

The Respondent was admitted to the Maryland Bar on December 16, 1988. After law school he clerked for The Honorable Barbara Kerr Howe and then served as an Assistant State's Attorney in Harford County, Maryland for nine years and head of the Environmental Crimes Unit at the Maryland Attorney General's Office for six years. Between 2006 and 2012, the Respondent worked for the United States Department of Justice (DOJ) Criminal Division in the Narcotic and Dangerous Drug section. Between 2012 and 2020, the Respondent was a trial attorney for the DOJ's Organized Crime and Gang Section (OCGS). The Respondent continues to work for the DOJ. **Petition at ¶¶ 3, 4;**[2] **Tr. 14: 120-24.**[3]

USA v. Francisco Jr.
Background

From the 1990's through 2013, the East Side Bloods gang (ESB) operated in the Salt River Pima-Maricopa Indian Community in Scottsdale, Arizona. Martinez Francisco, Jr. ("Martinez") was a founding member of the ESB. Between 2004 and 2013, multiple law enforcement agencies including the Mesa Police Department (MPD), the Salt River Police Department (SRPD), and the Arizona Department of Public Safety (ADPS) investigated the ESB for various crimes. **Petition at ¶¶ 5-7; Tr. 14: 128; 130.**

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[2] Where citations to the Petition are included in these findings, the Respondent, in his Answer, admitted the associated averment.

[3] Citations to the transcript will be in this format. For example, **Tr. 14** refers to the transcript of the proceedings on June 14, 2021. 120-124 refers to pages 120 to 124 of that day's transcript.

On September 1, 2011, the Government filed a ten-count indictment in the United States District Court for the District of Arizona. As amended,[4] the indictment charged Martinez and others with Violent Crimes in Aid of Racketeering Activity (VICAR), conspiracy to violate the Racketeer Influenced and Corrupt Organizations (RICO) Act, and multiple firearms offenses. *United States v. Martinez Francisco, Jr., et al.*, No. 2:11-CR-1728 (D. Ariz.) ("the ESB case"). **Pet. Ex. 4; Tr. 14: 120-124; 129.** On November 23, 2012, while the ESB case was pending, Martinez's brother and fellow gang member, Denicio Francisco ("Denicio"), shot Darcie Loring, Jr. (D.L). The third superseding indictment, filed on January 15, 2013, added Denicio as a defendant and added charges related to the November 23, 2012 shooting as well as the attempted shooting of a Government witness that occurred on December 31, 2012.[5] **Pet. Ex. 4; Tr. 14: 133.**

The East Side Bloods case, or "ESB case", as it was referred to in these proceedings, was complex. It involved nine defendants and 27 counts including conspiracies to murder, attempted murder of a law enforcement officer, attempted murder of other individuals, assaults, making false statements in acquisition of firearms, and obstruction of justice. **Pet. Ex. 4**; **Tr. 14: 33**. At the time of trial, there were over

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[4] The Government initially indicted some of the defendants on September 1, 2011. The Government filed superseding indictments adding defendants and additional charges on October 26, 2011, March 28, 2012, and January 15, 2013. The third superseding indictment upon which the matter proceeded to trial was filed on January 15, 2013. **Pet Ex. 4**.

[5] Denicio was later acquitted at trial of obstruction of justice in relation to the December 31, 2012 incident.

600 docket entries reflected on PACER (Public Access to Court Electronic Records), the electronic system that tracks federal dockets. **Resp. Ex. 2**. During the trial, the prosecution called 84 witnesses from the total of 149 on its witness list. Approximately 60,000 documents were provided in discovery.

The ESB case was assigned to the Honorable David G. Campbell. On September 2, 2011, Leisha Lee-Dixon, Esquire, a trial attorney in the DOJ Criminal Division, and Assistant United States Attorney Keith Vercauteren entered their appearances in the ESB case on behalf of the Government. Ms. Lee-Dixon was a member of the OCGS in Washington, D.C. Mr. Vercauteren worked in the United States Attorneys' Office (USAO) for the District of Arizona. Ms. Lee-Dixon was the lead prosecutor on the case. **Tr. 14: 139**.

In December of 2012, the Respondent was assigned to assist in the prosecution of the ESB case and traveled to Arizona in January 2013 to begin providing assistance. **Petition at ¶ 19; Tr. 14: 131.** Respondent was initially assigned as the "third chair" prosecutor. **Tr. 14: 131**. Aside from Ms. Lee-Dixon, Mr. Vercauteren and Respondent, the ESB prosecution "trial team" included local law enforcement agents Scott Krassow (MPD), Michelle Vasey (ADPS), and David Pew (SRPD). **Tr. 14: 137**.

Trial Preparation

The trial was originally scheduled to begin on April 30, 2013, and to last for six weeks, but was continued to September 5, 2013, and again continued to October 8, 2013. **Tr. 14: 130, 162, 177, 182**.

On March 6, 2013, the Respondent and Mr. Vercauteren met with Officer Justin Bartlett, who at the time was an officer with the SRPD, to prepare his trial testimony. In the course of the ESB investigation, Officer Bartlett, along with other law enforcement officers, searched a residence. Officer Bartlett recovered multiple firearms, rifles, handguns, and dozens of rounds of ammunition from two vehicles parked outside the residence. **Petition at ¶ 8; Pet. Ex. 7; Pet. Ex. 23 at 0514-0544.** He also arrested Denicio. Although Respondent was in attendance at the meeting with Officer Bartlett, Mr. Vercauteren conducted the interview of him. **Tr. 16: 87**. During the meeting, Mr. Vercauteren asked questions and Respondent took notes. **Tr. 14: 149**. A central issue in this disciplinary proceeding concerns the extent of Respondent's knowledge and recollection of information concerning Officer Bartlett.

Under the *Brady* and *Giglio* doctrines, prosecutors must disclose to the defense any evidence that is exculpatory to the defendant or could be used to impeach a witness. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).[6] During the March 6th interview, Mr. Vercauteren asked Officer Bartlett for any information that might implicate these doctrines by inquiring whether Bartlett's personnel files contained any information that would need to be disclosed to counsel for the defendants. **Tr. 14: 149; Resp. Ex. 305**. Officer Bartlett disclosed two citizen complaints of which he was cleared of any wrongdoing, which did not implicate the doctrines, but no other pertinent information. **Tr. 14: 156**. **Pet. Ex. 5, 6, & 57 at 1012;**

[6] *See Giglio v. United States*, 405 U.S. 150 (1972) (requiring prosecutors to disclose to the defense impeachment evidence regarding testifying law enforcement officers).

Tr. 14: 149-50;154-56. Mr. Vercauteren and Respondent did not make any *Giglio* disclosures to the defense based on this interview. **Petition, ¶¶ 21-23; Pet. Ex. 57, pp. 1012-1013.**

In the Case of *United States v. Henthorn,* the Ninth Circuit held that prosecutors must make affirmative queries of law enforcement agencies regarding law enforcement officers' personnel files. 931 F.2d 29 (9th Cir. 1991).[7] The United States Attorney's Office (USAO) in Phoenix has an attorney who is in charge of processing *Henthorn* requests, providing the other AUSAs with the results, and advising them on their obligations. **Tr. 14: 152; Tr. 16: 70-71**. On April 15, 2013, ten days before the initially scheduled start of the ESB trial, the *Henthorn* AUSA performed a *Henthorn* check on Officer Bartlett. **Tr. 14: 153-154; Tr. 16: 71**. The attorney advised Mr. Vercauteren that the results revealed no adverse information about Officer Bartlett and other officers that the Government intended to call as witnesses at trial. **Tr. 16: 70-71.**

Accordingly, Mr. Vercauteren and Respondent did not disclose any information to defense counsel in the ESB case. ***Id.*** Four days later, the lead prosecutor, Ms. Lee-Dixon, abruptly withdrew from the case following prolonged tensions with Mr. Vercauteren and Respondent, stating a need to obtain surgery as her reason for withdrawing. **Tr. 14: 158-160**. No substitute prosecutor was assigned to the case, so Respondent and Mr. Vercauteren assumed Ms. Lee-Dixon's former responsibilities and

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[7] *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991) (requiring prosecutors to examine the personnel files of testifying law enforcement officers for *Giglio* material).

became co-lead counsel. **Tr. 15: 20-21**. Respondent and Mr. Vercauteren requested a continuance of the trial due to Ms. Lee-Dixon's abrupt withdrawal. **Tr. 14: 163-64**. The requested continuance was granted on April 22, 2013. The trial was rescheduled for September and the Court informed counsel that the trial would need to be condensed to five weeks instead of six. **Tr. 16: 182**. On May 24, 2013, defense counsel filed a motion to continue the trial again, which was granted, and the trial was rescheduled to October 8, 2013. ***Id***.

The Court informed counsel that the trial had to be further condensed to four weeks. ***Id***. Respondent and Mr. Vercauteren condensed their witness list and worked on dividing up who would handle each witness. **Tr. 14: 200**. The decision was that Mr. Vercauteren would handle Officer Bartlett as a witness because Mr. Vercauteren was the one who had interviewed Officer Bartlett in March. **Tr. 15: 12**. After the initial *Henthorn* check on April 15, 2013, neither Mr. Vercauteren nor Respondent requested an updated *Henthorn* check on Officer Bartlett. **Tr. 16: 71**.

In September of 2013, the SRPD initiated an investigation into a number of officers, including Officer Bartlett, for various allegations. **Pet. Ex. 26.** On September 25, 2013, Officer Bartlett was placed on administrative leave. ***Id***. He resigned on September 27, 2013 before the investigation concluded. ***Id***.

At some point in September of 2013, Respondent became aware that Officer Bartlett had resigned and that he was the subject of a pending investigation by SRPD. Respondent was required to send weekly updates on the case to his supervisors at DOJ. **Tr. 15: 81**. On September 30, 2013, Respondent sent a weekly update by email to his

supervisors which contained various bullet points regarding different issues in the case. **Pet. Ex. 16**. One of the bullet points read: "Two Salt River Police Department Officers who played roles in significant events resigned last Thursday pending internal investigation. Deciding how to present the testimony through other witnesses." ***Id.***

Detective (now Sergeant) Michelle Vasey who was a member of the law enforcement team assigned to investigate the ESB matter, was called as a witness by the Petitioner. She testified that at some time prior to trial (she couldn't recall when), she became aware that Officer Bartlett had resigned from the SRPD and "was under investigation for some type of relationship he had, an affair of some sorts." **Tr. 14: 99**. She did not recall knowing the specifics at the time. At trial she testified that it became an issue about whether the information would have to be disclosed if he were used as a witness at trial and that she was "frustrated" about any need to disclose because "I did not think it should be an issue. It, the issues that he was dealing with, that I understood at that time, was an affair. I didn't believe it had anything to do with dishonesty, so I felt that it shouldn't be a big deal if we use him and, disclose the information." **Tr. 14:103**. At the trial of this matter, she initially testified that she had discussed the information she had learned about Officer Bartlett with the trial team, including Mr. Vercauteren and Respondent but then was shown the testimony she gave in connection with a DOJ Office of Professional Responsibility hearing at which she testified that she had such discussions with Ms. Lee-Dixon but not with Mr. Vercauteren and Respondent. **Tr. 14: 110-111**. Thus, in light of her conflicting testimony it remains unclear whether she conveyed her concerns to Respondent. Respondent testified that

he believed it was Mr. Vercauteren who initially informed him about Officer Bartlett's resignation. **Tr. 15: 96.**

Once it was discovered that Officer Bartlett had resigned, a decision was made to not call him as a witness. It was decided that the evidence the prosecution planned to have admitted through Officer Bartlett would be introduced through other witnesses. **Tr. 15: 7-8; Tr. 16: 86**. At trial in this matter, Respondent denied any involvement in the decision not to call Officer Bartlett and testified that he did not recall any discussions with Mr. Vercauteren about the decision. After the decision was made, however, Respondent did email one of the detectives working on the case on October 15, 2013 (**Pet. Ex. 22**) about whether another witness had been located to testify as to the matters that Officer Bartlett would otherwise have been called to testify about, so he was, at least at that point, aware of the idea that was being pursued. **Tr. 15: 108.**

The prosecution maintained a list of some 149 potential witnesses. Potential witnesses were either listed above or below a designated line. Mr. Vercauteren testified that witnesses "above the line" were those who would likely be called at trial and those "below the line" were not going to be called at trial but were kept on the formal witness list in case of any last minute need to call them and so potential jurors could be informed during *voir dire* of all individuals involved in the case. ***Id***. Before trial, Officer Bartlett

was moved to a portion of the Government's witness list under the designated line. **Tr. 16: 86**.[8]

The ESB trial commenced on October 8, 2013. **Tr. 14: 177**. At the time of trial, Martinez and Denicio were the only remaining defendants. On October 15, 2013, through the testimony of Detective Lamb, a witness being handled by Mr. Vercauteren, the Government sought to admit evidence regarding the items found by Officer Bartlett during the November 10, 2010, search. The Government was unsuccessful in obtaining admission of the guns and other seized items through Detective Lamb. **Tr. 14: 105**.

During a subsequent trial strategy nightly meeting, the decision was made to call Officer Bartlett to testify about the guns and other seized items and support their admission. **Tr. 16: 95-96**. Respondent testified that he believes he was not at this meeting. ***Id.***; **Tr. 15: 21-23**. Mr. Vercauteren testified that he initially assumed that Respondent had been at this meeting but now believes Respondent was not there. **Tr. 16: 95-96, 131.** Mr. Vercauteren recalls that ESB case agents Detective Vasey and Detective Krassow were at the meeting and that case agent Detective Pugh participated

[8] At trial in the case at bar, Mr. Vercauteren testified that he had no memory of having pretrial knowledge of the Officer Bartlett's resignation, pending investigation or affair. **Tr. 16: 85-86, 126, 129**. The Court does not credit this testimony. His testimony conflicts with that of Detective Vasey **Tr. 14: 103, 110-111,** and that of Respondent. **Tr. 15: 96.** Mr. Vercauteren further testified that the decision not to call Officer Bartlett was for purposes of condensing the witness list. ***Id***. The court does not credit this testimony either. In addition, after denying pre-trial knowledge several times during his testimony, Mr. Vercauteren then equivocated and stated that it was possible that he did have pre-trial knowledge that Officer Bartlett had resigned pending internal investigation. **Tr. 16: 128, 129.**

by phone[9]. ***Id***. Neither Detective Vasey nor administrative specialist Debra Vainio, two of Petitioner's witnesses in this case, testified about this meeting. After the decision was made to call Officer Bartlett, neither the Respondent nor Mr. Vercauteren renewed the *Henthorn* request regarding Officer Bartlett.

Having conducted the interview of Officer Bartlett, Mr. Vercauteren handled Officer Bartlett's witness testimony at trial. **Tr. 14: 148; Tr.15: 7, 13, 24, 27.** The evidence does not indicate that Respondent ever spoke or interacted with Officer Bartlett before, during, or after trial other than the March 2013 meeting at which he took notes regarding Mr. Vercauteren' s interview of Officer Bartlett. **Tr. 15:24-25**. No formal re-preparation of Officer Bartlett was conducted by Mr. Vercauteren after the mid-trial decision was made about the need to call him as a witness. ***Id***. Respondent testified that it was Mr. Vercauteren' s decision to call Officer Bartlett. **Tr.15: 22.** Respondent testified that he saw Mr. Vercauteren speaking with Officer Bartlett briefly in the hallway on the day of trial but did not know whether he was preparing him for his testimony or conversing with him about something else. ***Id***.

Officer Bartlett testified on October 22, 2013, and October 29, 2013. **Tr. 15: 108**. Just prior to Officer Bartlett being called to testify, Mr. Vercauteren advised Denicio's attorney, Mr. Rodriguez, that Office Bartlett was no longer with SRPD. **Tr.**

[9] Mr. Vercauteren testified that in the post-trial conference that evening, he discussed the decision to call Officer Bartlett with the trial team and was informed by Detective Pugh that Officer Bartlett "…had an affair on his wife and no longer worked [at SRPD]." **Tr. 16: 100.**

14: 38. Prior to trial, neither Mr. Vercauteren nor Respondent informed defense counsel of Officer Bartlett's resignation, his affair or that he was the subject of an investigation being conducted by the SRPD **Tr. 14: 106**.

At the ESB trial, Officer Bartlett testified about the November 10, 2010 search, the apprehension of Denicio on November 24, 2012, and a March 14, 2013 firearms recovery. Through Officer Bartlett's testimony the Government admitted items of evidence, including photographs, gun boxes, and rounds of ammunition. The Government also recalled Officer Bartlett on October 29, 2013, to identify Denicio as the D.L. shooting suspect apprehended on January 1, 2013. **Petition at ¶¶ 41-43; Pet. Ex. 23; Pet. Ex. 24; Pet. Ex. 25 at 0595; Pet. Ex. 57 at 1014.**

At the trial of this matter, Respondent testified that he had no memory of having pretrial knowledge of Officer Bartlett's affair or resignation but acknowledged that he must have known about his resignation and the pending investigation around September 30, 2013, when he sent the weekly update email to his supervisors. **Tr. 15: 8, 93**. He stated that he believed he had forgotten about his September 30th email, as Officer Bartlett was Mr. Vercauteren's witness and there were various other issues which captured his focus leading up to trial. ***Id***.

They included some significant health issues he experienced between the time he was assigned to assist on the case but before trial (discussed at more length later in these

findings), unexpected complications in his trial preparation work, and job-related conflicts pertaining to Ms. Lee-Dixon.[10]

The ESB trial ended on October 31, 2013. Martinez was convicted of conspiracy to violate RICO and four false statement charges. Denicio was convicted of conspiracy to violate RICO and the attempted murder of D.L. in aid of racketeering. Sentencing was deferred until February of 2014. **Tr. 15: 66**.

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[10] Testimony was received that Ms. Lee-Dixon had been increasingly hostile, rude and abusive toward Respondent in the weeks leading up to trial. **Tr. 14: 140-41.** When she rode the elevator with him, she would turn and face the corner and ignore him. She made clucking sounds when she passed him in the hallways. **Tr. 14: 140-41** On one occasion, she greeted Respondent in the morning by looking at him and saying, "Pitiful." On one occasion, she locked him out of the trial preparation room. **Tr. 14: 157**. She emailed Respondent that she would let him know when he was allowed to travel to the city of Phoenix. ***Id.*** She delegated only ministerial tasks to him and informed him he was not allowed to interview any witnesses by himself. **Tr. 14: 142-43.** It was suspected that she forged a letter to Respondent's supervisors accusing Respondent of engaging in inappropriate conduct on an airline flight, being drunk and disorderly on a plane. **Tr. 14: 177-181.** The allegation was unfounded. Respondent testified that the last time he had been on a plane was with one of his DOJ supervisors who confirmed that this incident never occurred. Respondent brought the issues with Ms. Lee-Dixon to his supervisors. At one point, she was instructed by the section chief to have no contact with Respondent. **Tr. 14: 177.** Nevertheless, the tensions only continued until Ms. Lee-Dixon abruptly withdrew from the case days before the originally scheduled trial. **Tr. 14: 157-59.**

Post-Conviction Disclosures
Regarding Officer Bartlett

After the trial concluded and prior to sentencing, Respondent returned home to Washington, D.C. and Mr. Vercauteren remained residing and working in Phoenix. **Tr. 14: 166**. On November 7, 2013, while Martinez and Denicio were awaiting sentencing, SRPD issued its internal report concerning the conduct of certain SRPD officers, including Officer Bartlett. **Pet. Ex. 26**. The report contained a finding that Officer Bartlett committed misconduct in connection with his relationship with Ms. Poppy Tanner, who was DL's aunt. SRPD sent the report to a different AUSA in reference to an unrelated case. That AUSA provided the report to Mr. Vercauteren. **Tr. 15: 29.**

In December of 2013, Mr. Vercauteren informed Respondent of the report. **Tr. 15: 29**. The report indicated details of Officer Bartlett's affair with Ms. Tanner, the investigation, and results regarding a number of other officers, and the ultimate findings concerning the allegations against those officers. **Pet. Ex. 26**. On December 9, 2013, Respondent took the report to his DOJ supervisor, Mr. Jaffe. **Tr. 15: 33**. Mr. Jaffe informed Respondent that "it" should be disclosed to defense counsel and that Respondent should also speak with Cynthia Torg, the Ethics Assistant Officer at DOJ, about the extent of the disclosure to be made. **Tr. 15: 34-35**. On December 11 and 12, 2013, Respondent spoke with the Ethics Assistant Officer, who advised him to disclose "it" and to seek guidance from the AUSA partners in Phoenix about the extent of the disclosure to be made and to defer to their standard practices. **Resp. Ex. 326; Tr. 15: 37.**

On December 13, 2013, Respondent informed Mr. Vercauteren that the consensus from his supervisors was to disclose the report and that they should speak regarding the best way to do so. **Resp. Ex. 327**. On December 19, 2013, Respondent had a conference call with Mr. Vercauteren, Mr. Vercauteren's supervisor Glenn McCormick, and John Tuchi, the Ethics Officer and Chief of the Phoenix Office of the USAO. **Tr. 15: 39-40**. During that call, Mr. McCormick and Mr. Tuchi directed Mr. Vercauteren and Respondent to draft a letter that disclosed parts of the SRPD Report without disclosing the entire report. ***Id***; **Tr. 15: 39, 43.**[11] After receiving these instructions, Respondent and Vercauteren worked together on a draft of the letter, circulated it to Mr. McCormick and Mr. Tucci, and sent the final copy to defense counsel on December 27, 2013. **Tr. 15: 44-45; Resp. Ex. 329**.

The letter disclosed various facts including that Bartlett had become involved in a romantic relationship with a woman, who was a relative of one of the shooting victims in the ESB case, that he provided unauthorized information to the woman, and that he resigned before the trial and before the investigation began. **Resp. Ex. 330**. It did not disclose certain other facts from the Report including that Officer Bartlett had used a work computer system to research the woman and used his department vehicle while

[11] Mr. Vercauteren testified that Mr. Tuchi advised him it was not necessary to disclose the report and directed what was to be put in the letter. **Tr. 16: 104, 105, 106-107, 133-34.** It is not clear whether this was a function of the fact that the report also dealt with the investigation of a number of other officers unrelated to the ESB case. Mr. Vercauteren also testified that upon reviewing the letter, Mr. Tuchi approved the letter and indicated that it was perfect and reflected exactly what they had discussed. **Tr. 16: 108.** After being reviewed by Mr. Vercauteren, the letter went out under his signature. **Tr. 16: 136.** The court did not hear from Mr. Tuchi regarding these points.

off-duty to transport Ms. Tanner. **Resp. Ex. 329**; **Pet. Ex. 26.** It also did not disclose that during an unrelated arrest of the woman, Officer Bartlett treated her favorably by returning her purse to her instead of seizing it for potential evidence. ***Id.***

Denicio's Motion for New Trial

On February 18, 2014, Martinez was sentenced by the trial court to 360 months of incarceration followed by five years of supervised release. **Petition at ¶ 54** Based on the disclosures contained in the letter regarding the SRPD investigation, Mr. Rodriguez, Denico's defense counsel in the ESB case, filed a motion for a new trial on May 28, 2014. **Tr. 15: 46-47**. The Motion focused on the assertion that there was newly discovered evidence and also asserted that the Government's failure to disclose exculpatory and impeachment information about Officer Bartlett prior to trial constituted a *Brady* violation. **Pet. Ex. 36**. That same day, Mr. Rodriguez, having discussed Officer Bartlett with one of Denicio's family members, wrote to the Respondent and Mr. Vercauteren and asked whether Officer Bartlett had sexual relationships with two of D.L.'s family members. **Pet. Ex. 35; Pet. Ex. 36; Tr. 14: 40-41.**

Respondent discussed the motion for new trial and the SRPD report with Kim Dammers, one of his supervisors at DOJ. **Tr. 15: 48**. He provided her with a copy of the motion and the SRPD report. ***Id***. At her instruction, Respondent and Mr. Vercauteren drafted a second disclosure letter to Mr. Rodriguez. **Tr. 15: 50-52**. Ms. Dammers instructed Respondent to include in the second disclosure letter the fact that

when Mr. Bartlett was initially confronted about the affair, he had lied about it. ***Id.* at 50**.

On or about June 13, 2014, the Respondent drafted a response to Mr. Rodriguez's letter stating:

> The information received from the Salt River Police Department is that Officer Bartlett had a relationship with one individual, not two, who is an aunt of shooting victim [D.L.]. Officer Bartlett admitted the relationship when asked by his supervisor and stated that it was over, but later acknowledged that the relationship continued after he told his supervisor it was over.

The Respondent sent the draft letter to Mr. Vercauteren. **Tr. 16: 51.** On June 17, 2014, Mr. Vercauteren sent the letter to Mr. Rodriguez and Mr. Rood without making any substantive changes. **Pet. Ex. 38.**

In fashioning the response to the motion for a new trial, Respondent, Mr. Vercauteren, and Ms. Dammers strategized that their strongest argument was to focus on the "materiality" prong under *Brady*—that is, that even if the information had been disclosed to defense counsel prior to trial, the defendants still would have been convicted based on the testimony of the other 84 witnesses and other evidence. **Tr. 15: 54**. Respondent testified that they pursued this strategy, rather than asserting that the motion mischaracterized evidence or was based on weak arguments, in order to avoid providing the defendants with potential grounds to seek habeas appeals under 28 U.S. Code § 2255. ***Id***. The Response did not include any statements about whether the prosecution team knew prior to trial that Officer Bartlett had resigned from SRPD

pending an internal investigation. **Pet. Ex. 40**. The Response to the Motion for a New Trial was filed on July 2, 2014. ***Id***.

The trial court held a hearing on the Motion for a New Trial on August 21, 2014. **Pet. Ex. 45**. Respondent briefly argued the Motion by submitting on the Government's pleadings. ***Id***. The court denied the motion, finding that the undisclosed evidence regarding Officer Bartlett was not material—i.e., that had it been disclosed, it would not have affected the outcome of the trial given the amount and credibility of the remaining evidence presented at trial. ***Id***.

The Ninth Circuit Appeal

On December 4, 2015, Denicio, through counsel, noted an appeal to the United States Court of Appeals for the Ninth Circuit arguing that the district court erred in denying the motion for new trial and that the Government violated *Brady* and *Giglio* by failing to disclose the SRPD investigation of Officer Bartlett and his resignation.[12] *United States v. Denicio Francisco*, Case No. 14-10433.[13] **Pet. Ex. 47.**

The Respondent, Mr. Vercauteren and Teresa Wallbaum, Esquire, a senior trial attorney in the DOJ Criminal Division prepared the Government's reply brief. **Tr. 15: 75**. Ms. Wallbaum assumed primary responsibility for drafting the *Brady* response but

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[12] The appeal also asserted that the Government improperly amended the indictment and that the trial court abused its discretion in admitting certain evidence and denying motions for mistrial.

[13] On December 15, 2015, Martinez, through counsel, also filed an appeal to the Ninth Circuit. Martinez did not allege any *Brady* violation or raise any issue regarding the Government's failure to disclose information about Officer Bartlett. *United States v. Martinez Francisco, Jr.*, Case No. 14-10079.

did so in discussion with Respondent and Mr. Vercauteren. **Tr. 14: 82; Pet. Ex. 73 and 75.**

The brief was filed on June 20, 2016. The final brief contained the following statements:

> The Government first learned about a disciplinary investigation regarding a former law enforcement witness well after the trial and then promptly provided the information to the defense.
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> ***
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> In addition, the Government was unaware of the investigation until well after trial, at which point the Government promptly disclosed the information to the defense.
>
> ***
>
> To be clear, the Government did not know of the Salt River Police Department's internal investigation until after trial. Had the Government been aware of allegations that Bartlett was in a relationship with the victim's aunt, the Government undoubtedly would have promptly turned that information over to the defense. The Government learned only of the investigation on December 6, 2013, however, one month after the Salt River Police completed the investigation and five weeks after trial.

Pet. Ex. 49 at 0930; 0936-0937.

Interview of Respondent by the DOJ's Office of Professional Responsibility

Ms. Lee-Dixon contacted Respondent's supervisors with concerns about the handling of the ESB case including "how [the information relating to Officer Bartlett] was presented in the [G]overnment's brief." **Pet. Ex. 57; Tr. 15: 77**. On August 2, 2016, Section Chief Jim Trusty referred these concerns to DOJ's Office of Professional Responsibility (OPR). ***Id***. On October 17, 2016, Respondent was interviewed by OPR. **Tr. 15: 83**. The OPR interviewers showed Respondent his pre-trial email of September

30, 2013, stating that two SRPD officers had resigned pending investigations. ***Id.*** Respondent did not recall the email until he was shown it at the interview and after reviewing it, readily acknowledged that prior to September 30, 2013, he must have had some knowledge of Officer Bartlett's resignation and pending internal investigation. **Pet. Ex. 58 at p. 160-61**. At the trial of this matter, Respondent testified that at the time he was reviewing the briefs prepared by Ms. Wallbaum, he did not recall the September 30, 2013 email. **Tr. 15: 83.** He also stated he did not recall the email or his pre-trial knowledge when working on the reply to the motion for new trial. **Tr. 15: 82.**

ESB Proceedings on Remand

On October 31, 2016, Respondent and Ms. Wallbaum filed an Unopposed Request to Stay Appeal for Limited Remand to the District Court based on the information developed during the OPR interview concerning the Government's pretrial knowledge about Officer Bartlett's difficulties and the inaccuracy of statements contained in the Government's appellate brief. **Pet. Ex. 51**.[14] The Government's request was for limited remand to the District Court for additional fact-finding regarding Denicio's Motion for New Trial and requested that Martinez's appeal also be stayed so

[14] The filing stated in part, "[t]he [G]overnment is now aware that its post-verdict disclosures about Officer Bartlett did not disclose the entire range of his misconduct and that certain statements in its response brief (concerning when some members of the prosecution team first learned that Officer Bartlett was under investigation) are mistaken." **Pet. Ex. 51, p. 0945.**

that he could evaluate the newly discovered information. The request was granted on November 10, 2016. **Pet. Ex. 51; Pet. Ex. 52.**

On May 5, 2017, the Government, represented by AUSAs Raymond K. Woo, Monica B. Klapper, and Ms. Wallbaum, also filed a supplemental response to the Motion for New Trial requesting that the court grant Denicio a new trial for the limited purpose of entering a guilty plea. The supplemental response stated:

> On April 11, 2017, this Court held a status hearing. At the hearing the government: (1) disavowed any previous oral or written suggestion that the prosecution team did not become aware of the impeachment information related to Officer Bartlett until after trial; (2) conceded that the prosecution team's post-trial disclosures to defense counsel and the Court concerning the impeachment information did not reveal the full scope of the impeachment information and also improperly downplayed the significance of that information; and (3) conceded that certain statements made in the government's post-trial motions and appellate briefs regarding Officer Bartlett's disciplinary proceedings and the resulting impeachment information were also inaccurate and misleading.

Pet. Ex. 53 at 0956.

The motion was granted, and upon motion from Martinez he was also permitted to join in the Motion for New Trial. **Pet. Ex. 54; Pet. Ex. 55.**

On July 25, 2017, Denicio pled guilty to conspiracy to violate RICO and discharging a firearm during and in relation to a crime of violence. On August 8, 2017, Martinez pled guilty to conspiracy to violate RICO and making a false statement in acquisition of a firearm. On April 20, 2018, the court sentenced both defendants to 240

months in prison followed by five years of supervised release. **Petition at ¶¶ 81-85; Answer to Petition at ¶ 81.**

Results of OPR Proceedings and Referral to Bar Counsel

The OPR review of Respondent's conduct concluded in June 2018 and the Professional Misconduct Review Unit issued its determination. **Tr. 15: 83**. Respondent was suspended for without pay for six days. ***Id***. OPR sent the Attorney Grievance Commission of Maryland and the Florida Bar a copy of its Findings. **Tr. 15: 87**. OPR also sent a copy of its findings to the Florida Bar, as Respondent is also licensed in that state. **Tr. 15: 87.** The Florida Bar did not institute proceedings. **Tr. 15: 88-89; Resp. Ex. 400**. On May 6, 2019, OPR notified Maryland Bar Counsel of its investigation of Respondent. The Attorney Grievance Commission of Maryland thereafter instituted the proceedings currently before this Court.

Respondent's Medical Conditions

In the months between the time Respondent was assigned to the ESB matter and the trial, Respondent developed a number of serious medical conditions and had a number of health setbacks. Following the trial court's first continuance of the ESB case on April 22, 2013, Respondent returned to his home in the Washington DC area after having briefly traveled to New York on an unrelated matter. **Tr. 14: 163-66.** While in New York, Respondent began feeling ill and upon his return to his home, Respondent slept for about a day. On the second day he was home Respondent couldn't get out of bed. **Tr. 14: 167**.

As Respondent explained:

> I had a crushing headache, fever, really heavy sweats, night sweats even though it was whenever I slept. My joints felt badly, and I, the nausea had pretty much passed by that point, but then I noticed the day that I actually went to the doctor that I had a, what's called a petechial rash, which is a raised rash that was radiating out from my trunk, and it was a little scary because by, if I'd fall asleep for a couple hours, I'd wake up and the rash would be like further down my arm, so.

Tr. 14: 167.

Respondent's wife, Shari Wilson, encouraged him to seek medical attention and Respondent went to see his wife's internist, Dr. Kristen Thomas on May 22, 2013. ***Id.* at 167-68.** Initially Dr. Thomas diagnosed Respondent with Fifth Disease and Respondent was not prescribed any medication. ***Id.* at 169.** Eight days later Dr. Thomas received lab results that Respondent had Rocky Mountain spotted fever. ***Id.* at 170**.

Following Respondent's diagnosis with Rocky Mountain spotted fever, Dr. Thomas prescribed a course of antibiotic doxycycline and upon Respondent's completion, Dr. Thomas prescribed another course of antibiotics. **Tr. 14: 170**.

Respondent recovered from his active Rocky Mountain spotted fever symptoms in two to three weeks. **Tr. 14: 170**. Respondent experienced post-acute illness symptoms for "quite some time" thereafter. ***Id.***

Respondent told Mr. Jaffe about both the initially incorrect diagnosis of his condition (Fifth Disease) and subsequent diagnosis of Rocky Mountain spotted fever. **Tr. 14: 175**. Respondent also advised Mr. Vercauteren and Debra Vainio, a paralegal, that he had contracted Rocky Mountain spotted fever. **Tr. 14: 186; Resp. Ex. 438.**

Respondent missed three weeks of work and returned to Arizona in mid to late June 2013. ***Id.* at 175-76**.

Respondent and other witnesses testified about their observations of the residual impacts of his Rocky Mountain spotted fever illness. His wife testified that:

> Yes, so Hans had a very unique and special long-term memory, and by that, I mean he had the ability just to recall for example, what he was doing 20 years ago today. And it was sort of a, it was the kind of things that would come up when you were with friends and someone would say, well I can't remember what I did yesterday, and I would say, well Hans can tell you what he was doing 24 years ago tonight. And it was sort of quirky skill or memory feature. I've never known anyone else to have something like that. And I did note that after the bout with Rocky Mountain Spotted Fever, that he does not have that anymore. [We] talk in our family about the fact that most people never had that to begin with, so losing that is, it's a loss, but it's something that most people never had in the first place. So, that was something that I noticed in the months after the Rocky Mountain Spotted Fever.

Tr. 15: 161.

In March 2019, well after the conclusion of the ESB matter, Dr. Thomas referred Respondent to Dr. Matsumoto because she was concerned about Respondent 's 35-pound weight loss, low platelets, and a series of parotid gland infections Respondent had where a large hard mass would form behind his ears which was painful and disfiguring. **Tr. 14: 190-191.**

Dr. Matsumoto confirmed that it appeared Respondent had Sjogren's Syndrome since he started to have the unexplained, repeated asymmetrical infections in his parotid

glands in 2007. **Tr. 14: 191.** Respondent's Sjogren's Syndrome diagnosis was confirmed by Dr. Alan Baer from Johns Hopkins University. **Tr. 14: 193-194**.

In the case at bar, Dr. Christiane Tellefsen was admitted as an expert in forensic psychiatry. **Tr. 16: 19.** Dr. Tellefsen prepared an expert report for this case dated March 31, 2021, and an addendum May 6, 2021. **Tr. 16: 34-35; Resp. Ex. 432, 434**. It was Dr. Tellefsen's opinion that:

> [Respondent] has a number of physical health problems, some chronic, some acute. And he also, particularly in 2013, suffered from the effects of, sort of, the mental effects of a lot of accumulated stress during that year such that it rose to the level of a diagnosis that psychiatrists call adjustment disorder. It's a stress-related condition.

Tr. 16: 23.

In support of her adjustment disorder diagnosis for Respondent, Dr. Tellefsen stated that she considered Respondent's Sjogren's Syndrome, his Rocky Mountain spotted fever diagnosis, situational stress from starting a new job, his being assigned to the ESB Case which was complicated, large, and different from anything he had worked on before, as well as his difficult interactions with Ms. Lee-Dixon. **Tr. 16: 23-29**.

Regarding the first factor of her analysis, Dr. Tellefsen explained:

> …[Respondent] has something called Sjogren's syndrome which is an autoimmune disorder where immune cells in the body attack what are called epithelial cells. They're cells that serve as the lining of certain organs like your mouth or your eyes or your GI tract, your joints. And what happens when your immune cells attack these -- create this attack is that these parts of your body basically dry up. So you -- you don't [produce] tears, you don't produce saliva, your joints become creaky. And this leads to problems with recurrent infections because you don't – you're not sort of

> -- you don't have natural defenses to basically wash away germs that land on you all day long. It can lead to problems with your eyes with corneal abrasions because you're not able to -- because you don't have enough tears, you don't wash away crud that's in your eye and it stays there and it causes an abrasion to your cornea. And then, of course, you know, there's joint pain, so it's like an arthritis kind of condition which can be very fatiguing. A lot of these patients complain of chronic fatigue as well. It's a condition that is often not recognized early on, so most people who have it, find that it, when it is diagnosed, it's diagnosed in retrospect, meaning that you finally have accumulated enough of a track record with these symptoms that they are -- somebody finally puts it together and says oh, you've got this condition. And then there is some definitive testing that would confirm the diagnosis which is what he had a couple years ago. But he has had symptoms of this since 2007. It is also a condition that worsens when somebody is under stress or not taking care of themself well like any other chronic condition would worsen in those conditions.

Tr. 16: 23-24.

According to Dr. Tellefsen, Respondent's Sjogren's Syndrome impacted Respondent's work performance as follows:

> I think that there -- he has the general symptoms of -- you know, the debilitation and fatigue that comes from the arthritis and just having to cope with all of this dryness and, you know, it makes it harder to read, for instance, because your eyeballs are really dry. He's had some corneal abrasions so that's going to impact his vision a little bit and the reading, you know, because it's like getting schmutz on your windshield. You know, it just gets harder and harder to see through the cornea, so you have to focus. It's just more effort to focus. So I would say, in general, that the Sjogren's is just – it's just debilitating. I don't know that it's doing any -- making a specific problem for him other than that, but it's just this general -- it just makes everything harder.

Tr. 16: 32-33.

Regarding the second factor of her analysis, Dr. Tellefsen explained:

> [Respondent] had another health problem, an acute health problem, in 2013 -- May of 2013 when he got infected with Rocky Mountain Spotted Fever which is a bacterial infection that comes from being bitten by a dog tick in the Western United States, the Rocky Mountain area, of course. That's why it's called that. And this is an infection that can be fatal if it's not treated. It's often fatal if it's not treated, but it is actually easily treated with an antibiotic if somebody figures out that's what's wrong with you. So you have to be tested for it and the diagnosis has to be confirmed and that takes a while. So there's a delay sometimes in getting that diagnosis. And in his case, there was a further delay because he had, most likely, contracted the illness in Arizona where it is endemic, but then came back to Washington and got sick. And the doctors in Washington, not being familiar with this because it's a Western United States illness, took a little bit longer to figure what was going on with him. Eventually they did, and then he was started on treatment. So there was a delay in getting antibiotics started after he had been symptomatic for a while. So the symptoms are a high fever and a very unpleasant full-body rash. And what -- what happens with that illness is that the -- the bacteria mainly affects endothelial cells which are the cells that line your blood vessels. So you get a lot of inflammation in your circulatory system. And people who aren't treated for it can end up with so much inflammation, particularly in their extremities, that they end up having gangrene and needing amputations and that sort of thing. It can also affect what's going on in your brain. So you can imagine there's lots of blood vessels in your brain that can be inflamed and you can have lots of cognitive symptoms from this illness as well. The sooner you get treated, the less likely you are to have any of these complications. But people who have complications from the illness, those symptoms can last for quite some time. In his case, he -- the thing he noted most of all was that he had some cognitive symptoms after the acute infection resolved. And what he noticed was that he just felt slowed and dulled and specifically had trouble spelling. He'd never had much of a problem spelling before, and so this was this new found issue for him. Thank

> God for spell check I guess. But he -- you know, he was bothered by this. This -- this is what he told me when I talked to him this year. When he spoke with his doctor back in 2013, he also complained of short-term memory problems and language problems. When I spoke with his wife, what she recalled is that he had -- he developed these -- a strange way of speaking. She -- she described it as the words -- his words were mixed up. So the syllables, the order of the syllables were mixed up. So, for instance, instead of saying elephant he might say effelant (phonetic sp.), like that sort of thing. And that is a specific symptom that you see when people have inflammation in the language part of their brain, and that is a called paraphasia or alternate speech. And he had this, according to his wife, he had it throughout 2013 and then it slowly started to get better. I didn't notice any of that type of speech pattern when I talked to him. So as far as I can tell, it has resolved, but it was an issue for him in that year. When you have a patient who has that sort of problem, you would expect that he will also have other problems with his language functions just because that part of the brain is being affected. So his complaints of feeling a little bit slowed down, having to think harder about what he's saying, make sure his words come out right, being able to spell properly, all of those things are consistent with having that type of complication from the Rocky Mountain Spotted Fever. So there's that going on. So that's two medical problems.

Tr. 16: 24-27.

According to Dr. Tellefsen, memory loss associated with Respondent's Rocky Mountain spotted fever had an impact on Respondent's job performance:

> Well, it -- it just makes everything harder. You've got to -- first of all, you have to know that you have it. So that's half the battle all -- all by itself because if you don't remember how do you know that you don't remember, right? So somebody has to tell you that you've got something wrong. But once you know that you've got a problem -- and typically in a case like this what the issue is, is storing the memory in the first place because you're, you know, you're just laid low. Your concentration is off, your attention span

is shorter, so -- so you have to work harder to store the information. You've got to start writing stuff down. You have to remember where you wrote it down. You know, you have to come up with new coping strategies to deal with that.

Tr. 16: 30.

Regarding the third factor for her analysis, Dr. Tellefsen opined:

Then we have the situational stress that was happening in this year starting with being in a new job and being assigned to a case in Arizona that was different from anything he'd worked on before. He was put on a case where he was the third chair, and at the brink of this very large trial the first chair pulled out and then it was just the two of them to handle this large trial. So there's that problem. He was assigned to this case in Arizona where he had never worked before. The case also involved tribal law which he had also not worked with before. So he's in this foreign state with these different legal systems, different personnel, different judges, and that's a lot of stress. It's not that he's not capable of doing that, but it's a lot. And he's also middle aged. He's not 25 anymore, sad to say for all of us. And so it's just – it's a – it's a lot to take on. It's a lot to take on when he already has this -- these other -- this other chronic health problem, his Sjogren's syndrome with the arthritis and fatigue and so forth. But to further complicate that situation, he also had a problem with a colleague that was particularly difficult because he didn't understand where it was coming from. So he had a female colleague who started complaining about him. And making complaints that, in his mind, were unfounded or a little nuts. And eventually she made enough complaints about him that he started trying to ignore them, I guess. But, so there's this sort of side issue, the side stress going on while he's trying to work through this case. The case itself was very complicated, 150 witnesses that had to be whittled down, difficult criminal -- I mean, these are, like, bad people, right, bad crimes. There was some witness intimidation. There was another issue with one of the witnesses. He needed to make sure that she had been threatened and he needed -- she had a miscarriage, and he needed to make sure somehow that her

> baby got buried on the tribal land. I mean, there's just all these things going on that were adding to this general ball of stress that was this trial, but he proceeded, continued. And, you know, the trial got delayed, I guess, at some point in 2013, but it still occurred maybe in September. I don't remember the exact month, but later in the year. He got through the trial and so the trial itself was stressful. So there was all these things going on in 2013 that it was just a big, big bundle of stress.

Tr. 16: 27-29.

Regarding Respondent's work stress, Dr. Tellefsen opined:

> Well, it depends which stress we're talking about. So the trial was over in -- the big trial was over in 2013. And then there was, like, little pockets of that that resurfaced subsequently with the appeals and whatnot and the fact that we're all sitting here. The -- the issue with his colleague continued up until the pandemic because she was -- remained down the hall from him at the DOJ. So he had this sort of intermittent exposure to her and her behavior. But his -- you know, the -- the intensity of that stress from 2013 pretty much resolved when that trial was over and he came back to DC and things settled down.

Tr. 16: 33.

Dr. Tellefsen opined that Respondent's work stress would have impacted his ability to practice law in the 2013-2014 timeframe. **Tr. 16: 34**. She also opined that Respondent is "perfectly capable of practicing law right now." **Tr. 16: 34**.

Dr. Tellefsen testified that she held the opinions she expressed in this case to a reasonable degree of medical and professional certainty. **Tr. 16: 34**.

CONCLUSIONS OF LAW

AZRPC Rule 1.1. Competence.

Rule 1.1 provides,

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

In this matter, Petitioner contends that Respondent violated Rule 1.1 when he failed to meet his obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), to timely inform the defense that Officer Bartlett had resigned from the SRPD pending an internal investigation, and failed to renew the Government's *Henthorn* request as to Officer Bartlett or to speak directly to Officer Bartlett about the circumstances of the SRPD investigation before Officer Bartlett was called to testify for the Government. The thrust of Petitioner's contention is that these asserted failures establish that the Respondent failed to competently represent his client.[15]

Brady violation

To establish a *Brady* violation, the Petitioner must establish that the prosecutor failed to disclose "evidence favorable to an accused . . . where the evidence is material either to guilt or punishment." ***Id***. At 87. Subsequent decisions have clarified that evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United*

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[15] *Smith v. State*, 465 N.E.2d 1105, 1119 (Ind. 1984) (asserting the government is the client of a prosecutor).

States v. Bagley, 473 U.S. 667, 682 (1985). Merely "showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The materiality standard also applies to the obligation to disclose impeachment evidence as long as the reliability of a witness is determinative of guilt or innocence. *Giglio v. United States*, 405 U.S. 150, 155 (1972); *see also State v. Williams*, 392 Md. 194, 210 (2006) ("[U]nder *Giglio*, when the reliability of a witness is determinative of guilt or innocence, nondisclosure of such evidence falls within *Brady*.")

Because Petitioner's claim that Respondent's violation of AZRPC 1.1 is expressly founded upon the assertion that his conduct violated the requirements of *Brady (See* Petitioner's Proposed Findings at page 23), it was Petitioner's burden to establish by clear and convincing evidence in connection with the alleged violation of Rule 1.1 that Respondent's conduct violated the requirements of *Brady.* Specifically, Petitioner alleges that Respondent violated *Brady* by failing to timely inform the defense that Officer Bartlett had resigned from the SRPD pending an internal investigation. Central to the resolution of that issue is whether Petitioner has established in the course of Respondent's trial that the information the prosecution team knew before Officer Bartlett gave testimony in the ESB case was material to the ESB case—i.e., that had it been disclosed, the defendants would not have been convicted.

In the case at bar, Mr. Rodriguez, defense counsel for Denicio in the ESB case, testified that if he had known before the trial, "… that Officer Bartlett was involved in an intimate relationship with a member of…one of the alleged victim's families, I definitely would have explored that in more detail during trial…I think it would have weighed heavily on the credibility of the entire investigation." Mr. Rodriguez made the same arguments to Judge Campbell, who presided at the trial and at the post-trial motion for a new trial. Judge Campbell determined that there was no *Brady* violation because the evidence was not material to the case. *See* **Pet. Ex. 45**. Additionally, Mr. Rodriguez's argument that the information contained in the disclosure letters would have affected the outcome of the trial, was not successful before Judge Campbell. Mr. Rodriguez did not establish, to Judge Campbell's satisfaction, that the government's pre-trial non-disclosures, affected the reliability of the witness to the extent of being "determinative of guilt or innocence." *Giglio, supra.*

Judge Campbell rejected defense counsel's argument that Officer Bartlett was the only link to a shooting and sided with the Government's position that Officer Bartlett's testimony was minor in comparison to the other evidence. **Pet. Ex. 45.** Additionally, Judge Campbell considered that Officer Bartlett was one of more than 80 witnesses called at trial. ***Id.*** Judge Campbell deemed Officer Bartlett's testimony to be only a "minor part of the evidence" in the case, … "more supportive and not central to the proof the government presented…." ***Id.***[16]

[16] In particular, Judge Campbell stated: I think the same is true for the testimony he [Officer Bartlett] gave about finding some guns in 2013, including one or more on top

In the case at bar, Mr. Rodriguez acknowledged that Officer Bartlett was "one of the foundational witnesses for…some of the items that were found in the search. But beyond that, I do not believe that Officer Bartlett had any other involvement as an investigating officer for the other alleged various offenses." **Tr. 14: 37.** Mr. Rodriguez also testified about the complex nature of the case and the various elements that had to be met, such as "the predicate acts that constituted the activity of the organization of the members in furtherance of the organization." **Tr. 14: 33.** He stated that "there were many different dates of alleged offenses for the underlying offenses that occurred in different locations… There were certain alleged members of the gang who were present, and sometimes they were not present at other times." **Tr. 14: 33-34.**

This Court is not in a better position than Judge Campbell to determine how any lack of disclosure of the fact that Officer Bartlett had resigned and was under investigation by the SRPD affected the outcome of the trial. The Court is not in a position to reach a determination, different from that of Judge Campbell regarding the weight those two pieces of information had in comparison to the other evidence presented or to find that, had the pre-trial disclosures about Office Bartlett's resignation

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[cont'd from page 35] of a shed that was linked back to other events...to me, that was a minor part of the evidence that was in support of Count 2...The testimony that Officer Bartlett gave on Counts 25 and 26, however, on my view, was supportive and not central to the proof that the government presented on those counts...My judgment then, is that had this set of problems with Officer Bartlett been disclosed, the portion of the evidence it would have undercut...would not be substantial or significant. **Pet. Ex. 45 at 11.**

pending investigation been made, the outcome of the proceedings would have been different.

The Court concludes that Petitioner has not established, by clear and convincing evidence, that the pre-trial non-disclosure by the prosecutorial team collectively or Respondent individually, regarding Officer Bartlett's resignation and pending internal investigation, amounted to a violation of *Brady.* Because Petitioner has predicated its argument that Respondent did not provide competent representation to his client by assertedly failing to meet his obligations under *Brady,* Petitioner's argument fails.

Failure to Renew the *Henthorn* Request

Petitioner argues that Respondent failed to competently represent the government by not renewing the *Henthorn* request as to Officer Bartlett and by not speaking directly with Officer Bartlett about the circumstances of the SRPD investigation before he was called to testify. Petitioner's contention seems to be that because Respondent had pre-trial knowledge that Officer Bartlett had resigned from the SRPD pending an internal investigation, it was his responsibility to renew the *Henthorn* request.

The size, scope and complexity of the case required that responsibility for handling certain portions of it be divided. Mr. Vercauteren and Respondent determined which of them would be responsible for which witnesses. **Tr. 16: 79.** Notably, Mr. Vercauteren assumed responsibility for handling Officer Bartlett as a witness. **Tr. 16: 87, 94, 129.** Respondent was not assigned the responsibility to do so. In fact, at the time Mr. Vercauteren originally conducted his interview of Officer Bartlett,

Respondent had been under instructions by his then-supervisor, Ms. Lee-Dixon, not to meet with any witnesses alone. At the initial meeting with Officer Bartlett, Mr. Vercauteren conducted the questioning and Respondent was a notetaker.

The original *Henthorn* check on Officer Bartlett was performed in April of 2013. The trial took place in October, six months later. Mr. Vercauteren testified that *Henthorn* requests on the law enforcement officer witnesses in the ESB case prior to the first scheduled trial date were his responsibility. **Tr. 16: 70-72.** ("…that is something I would have done in the case for Ms. Lee-Dixon). It is unclear how, if at all, responsibility for *Henthorn* checks was apportioned after that time. Mr. Vercauteren explained the process he observed. He would give a witness list to his legal assistant, group the witnesses by agency, and then she would take care of contacting each agency to request that *Henthorn* checks be performed. ***Id.*** Mr. Vercauteren explained that the *Henthorn* checks are returned to the AUSA in the office designated to handle *Henthorn* returns. ***Id.*** That AUSA provides advice on the responses and whether information needs to be disclosed. Mr. Vercauteren testified that continuances happen routinely and that "…if it just gets continued, you know, a handful of months, oftentimes we don't re-request that from the agency. Obviously if it is a new witness or something like that, we would submit a new request, but not if it's with the same witness" **Tr. 16: 71-72.** Mr. Vercauteren stated in the event the continuance was for a seven or eight month

period, he might. **Tr. 16: 119-120.** He testified that he was unaware if there were any policies in the office about updating *Henthorn* requests. ***Id.***

Petitioner presented no evidence about the standard practice to be observed regarding the frequency with which *Henthorn* requests are to be performed on the same witness in the event a trial is continued. Petitioner did not clearly establish that Mr. Vercauteren' s standard practice in particular, or that of the Phoenix prosecutor's office in general, of not re-performing *Henthorn* checks for the same witness multiple times, rises to the level of incompetence on their part, let alone on the part of Respondent individually.

In *Attorney Grievance Comm'n v. Pennington*, 876 Md. 565 (2005), the Court analyzed an attorney's failure to realize that a complaint had not been properly docketed, which resulted in the statute of limitations running. The Court determined that "while a better office system would have detected the problem, we do not think that such oversight or negligence constitutes sanctionable conduct" as it pertains to Rule 1.1 and Rule 1.3. *Pennington*, 876 Md. 565, 594 (2005).

The gist of Petitioner's claim is that, notwithstanding the size and complexity of the ESB case, it was Respondent's responsibility to perform the *Henthorn* checks on a witness it was not his responsibility to prepare and whose trial questioning he was not assigned to handle. Respondent deferred to the standard practice of the Phoenix office, the *Henthorn* AUSA in that office, and Mr. Vercauteren. The Court is not clearly convinced that this established incompetence of the Respondent under Rule 1.1.

Petitioner maintains that because Respondent did not speak directly with Officer Bartlett about the circumstances of the SRPD investigation before Officer Bartlett was called to testify for the Government, he violated the competency provisions of Rule 1.1. The extent of the pre-trial contact Mr. Vercauteren had with Officer Bartlett after finding out about his resignation and pending investigation is vague. The evidence does indicate that Mr. Vercauteren spoke with Officer Bartlett in the courthouse hall before his trial testimony began (**Tr. 16: 94)** and then advised Mr. Rodriguez, Mr. Denicio's attorney, that Officer Bartlett was no longer with the SRPD. Mr. Vercauteren imparted nothing of substance to Respondent about his day of trial conversation with Officer Bartlett. (**Tr. 16: 95**). Again, with his own portion of a large and challenging case to handle and the sudden and unexpected increase in responsibilities with regard to it upon Ms. Lee-Dixon's departure, the Court does not believe it was incompetent for Respondent to rely upon Mr. Vercauteren to speak with Officer Bartlett about the circumstances of his resignation or the investigation. Even if it could be said to be careless of Respondent to have not spoken with Officer Bartlett, the Court is not convinced that this amounts to a violation of Rule 1.1. *See Attorney Grievance Comm'n v. Thompson*, 376 Md. 500, 512 (2003) (stating that "a single mistake does not necessarily result in a violation of Rule 1.1 and may constitute negligence but not misconduct under the rule").

"Whether the representation the lawyer gives is incompetent or is merely careless or negligent depends upon what reasonably is necessary in the circumstances, i.e., the facts and circumstances of the particular case." *Attorney Grievance Comm'n*

v. Mooney, 359 Md. 56 (2000). "In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include: the relative complexity of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question." ***Id.***

Respondent has dedicated his legal career to public service. RX 437. At the time Respondent tried the ESB Case in October 2013, Respondent had been a prosecutor for 22 years. ***Id.*** Respondent started working as a trial attorney at the DOJ in the Narcotic and Dangerous Drug Section in fall of 2006. **Tr. 14: 120**. In late summer 2012, Respondent joined the Organized Crime and Gang Section ("OCGS") of the DOJ as a Trial Attorney. ***Id.* at 121-22**. He was qualified to handle the ESB case in competent fashion.[17] There is every indication that the Respondent prepared thoroughly to present the case and shouldered his share of the substantial workload. In accordance with the *Mooney* case, it was not only "feasible" but eminently reasonable to defer matters and responsibilities regarding Officer Bartlett, to his colleague, Mr. Vercauteren, a prosecutor "of established competence in the field in question." *Mooney*, 359 Md. 56 (2000)

[17] In addition, the DOJ has a formal process to assess the performance of its trial attorneys. ***Id.*** at 125. The yearly performance reviews are based on a scale of one to five with five being the highest score. ***Id.*; Resp. Ex. 43**. Since Respondent joined OCGS his yearly performance reviews have been either four or five. ***Id.*** This is further evidence of competency.

Under the circumstances of this case, the Court does not find that the actions upon which the Petitioner relies in support of its Rule 1.1 argument warrant a finding that Petitioner was incompetent.

AZRPC Rule 1.3. Diligence.

> A lawyer shall act with reasonable diligence and promptness in representing a client.

Petitioner alleges that Respondent violated Rule 1.3 when he failed to comply with his disclosure obligations regarding Officer Bartlett. Petitioner maintains that Respondent did not act with required diligence in the representation of his client when, after it was decided that Officer Bartlett's testimony would in fact be needed at trial, he did not timely notify defense counsel that Officer Bartlett had resigned pending an internal investigation, did not make a renewed *Henthorn* request and did not make any inquiry regarding the circumstances of Officer Bartlett's departure from SRPD.

Petitioner states that Respondent violated his obligation of diligence under Rule 1.3 when he and Mr. Vercauteren "decided to replace Officer Bartlett as a witness rather than disclose this information to the defense." Petitioner's Proposed Findings at p. 24. Petitioner cites no law to support the proposition that a prosecutor is duty bound to turn over impeachment evidence about an individual who is not going to be a witness.[18] The

[18] Petitioner cites *United States v. McClellon*, 260 F.Supp.3d 880 (E.D. Mich. 2017) for the proposition that information that law enforcement witness was suspended pending an internal investigation into his conduct should have been disclosed. That case is arguably distinguishable because the witness in question was the prosecution's primary witness upon whose shoulders the issue of guilt or innocence rested and whose testimony, if impeached, "would have had a devastating impact on the government's

prosecution may decide not to use a potentially problematic witness after assessing whether the witness could be impeached. Nor is the Court persuaded that diligence requires that the prosecution request a *Henthorn* information on a witness it decides not to call.[19]

It is not clear what role Respondent played in the decision that Officer Bartlett would need to be called as a witness. The decision about the need to call Officer Bartlett apparently occurred during a nightly trial team meeting in October 2013, in the midst of the trial after the unsuccessful attempt to admit seized guns and other items through the testimony of Detective Lamb. **Tr. 16: 92, 95.** Respondent does not recall being at this meeting. Although Mr. Vercauteren initially assumed Respondent had been at this meeting, he subsequently acknowledged a belief that he was not there. **Tr. 16: 96, 99, 111, 136.** Mr. Vercauteren testified that he believes that the only individuals at the meeting were himself, Detective Vasey, Detective Krassow, and Detective Pugh. **Tr. 16: 96.** Mr. Vercauteren stated that during the meeting Detective Pugh advised those in attendance that Officer Bartlett had resigned because he had an off-duty affair on his wife. **Tr. 16: 95-96.** Mr. Vercauteren indicated he believed that this information would not implicate the *Giglio* or *Brady* doctrines. **Tr. 16: 98, 100-101, 139.**

[cont'd from page 42] case...." *Id.* at 885. The case did not involve an investigative report about a witness the prosecution had made a decision not to call.

[19] Respondent described his understanding of the procedure to be that an attorney from the trial team lists the witnesses from an agency who are "likely" to be called and that is filtered through the *Henthorn* AUSA who makes the agency request. **Tr. 14: 154.**

The Court is not satisfied that Respondent was in attendance at the meeting. Additionally, given the size and complexity of the ESB case, and the concomitant necessity for a division of labor and responsibility, the Court finds that it is unreasonable to impose upon Respondent the responsibility for ensuring that Mr. Vercauteren did everything required with regard to every single witness -- either the 149 on the potential witness list or the 84 who were actually called – as opposed to ensuring all was properly done with regard to the witnesses that Respondent was assigned the responsibility of handling. The diligence required by Rule 1.3 is "reasonable" diligence. What is reasonable depends on the circumstances of each case.[20]

[20] Respondent's October 6, 2013 email to Mr. Vercauteren ("Are you sure we got somebody else that can cover that?) **Pet. Ex. 18** indicates a recognition that it was Mr. Vercauteren who was to make the ultimate decision about whom to use to replace Officer Bartlett. This would be consistent with the evidence in this matter that it was Mr. Vercauteren who was assuming this aspect of the ESB case. This is substantiated by the fact that it was Mr. Vercauteren who ultimately handled the questioning of Officer Bartlett when called at trial. It was Mr. Vercauteren who apparently hastily prepared him for his testimony in the hallway outside the courtroom **Tr. 16: 94**, that Respondent was not present when he did so, **Tr. 16: 95,** and it was Mr. Vercauteren who ultimately advised Mr. Rodriguez, Mr. Denicio's attorney on October 22, 2013, just prior to calling Officer Bartlett to testify, that Officer Bartlett was no longer with the SRPD. **Tr. 14: 38.**

The December 2013 Disclosure Letter

Petitioner also argues that Respondent violated Rule 1.3 when he prepared the post-conviction disclosure letters to defense counsel dated December 27, 2013 and June 13, 2014. **Pet. Ex. 33; Pet. Ex. 38**. Specifically, Petitioner alleges that he failed to disclose that Officer Bartlett was placed on administrative leave pending investigation, that Officer Bartlett resigned during the investigation, and that the trial team was aware of this information pre-trial. As it pertains to the second of these assertions, paragraph 3 of the December 27, 2013 letter, it states in pertinent part, "The Salt River Police Department's Professional Standards Bureau initiated an investigation of the allegations on September 9, 2013, and Bartlett resigned on September 27, 2013, while the investigation was still pending." It then discusses the findings of the internal investigation. Therefore, the contention that the letters did not disclose that Officer Bartlett resigned during the investigation is without merit.

As to the allegation that in the letters Respondent failed to disclose that the trial team was aware before trial that Officer Bartlett had resigned during the SRPD investigation, the Court is persuaded that Respondent genuinely did not recall the pre-trial knowledge he or the prosecution team had about Officer Bartlett at the time of drafting these letters. His lack of recall is understandable. He was originally assigned to the case as a third chair prosecutor but was suddenly elevated to the position of co-first chair. There was turmoil in the office and difficulty with a supervisor providing distractions that might otherwise not be an impediment to his duties. The trial was

lengthy, complex and involved. Trial preparation was commensurately challenging. There were approximately 150 witnesses on the prosecution's witness list. The witness involved was characterized by the trial judge as comparatively minor in terms of his role. There was a division of responsibility for handling the witnesses and the witness in question was not his. His pre-trial involvement with the witness appears to have been limited to the initial interview in which he was simply a note taker. Between the time he first started work on the case and the time of trial he had serious health issues which according to the testimony had a detrimental effect on his memory and ability to remember things.

To the extent Petitioner's argument encompasses the notion that Respondent's failure to recall his September 30, 2013, email when drafting the disclosure letters amounts to a lack of diligence, the Court takes note of Respondent's testimony about the process he observed in drafting the letters. He received the SRPD investigative report on December 9, 2013. That day, he took the report to his supervisor, Mr. Jaffe and discussed it. Mr. Jaffe told him that he thought he should disclose the report, but to first get guidance from the Ethics Assistant Officer. Two days later, Respondent discussed the report twice with the Ethics Assistant Officer. She told him she thought he should disclose the report, but to also get guidance from and defer to the AUSA partners in Arizona. The next day, Respondent advised Mr. Vercauteren that the consensus from his supervisors was to disclose. About a week later, Respondent, Mr. Vercauteren, Mr. Vercauteren' s supervisor, and the District of Arizona's ethics advisor had a conference call. The supervisor and ethics advisor told Respondent and Mr.

Vercauteren to draft a letter and disclose parts of the report.

Taking the advice of DOJ's Ethics Assistant Officer to defer to the practices of the Arizona office, Respondent drafted the letter with Mr. Vercauteren. Respondent assisted in editing these letters, but it appears from a review of **Pet. Ex. 32** that the letters were prepared in accordance with the advice and direction he had received. Petitioner's Exhibit 32, makes clear that the draft was forwarded in consideration of the prior day's phone call with "Glenn and Tuchi." Respondent also includes the following language in the email to Mr. Vercauteren: "Here is my crack at a first draft . . . I also included the part about the woman being related to a different victim in the case even though I think it is totally irrelevant. I just think in discovery issues it is always better to overdisclose. If you (or your chain) think that is a bad idea or inappropriate, then I am fine with you taking that part out. Send me a copy of what you end up sending out.".[21]

The Court is satisfied that Respondent acted with appropriate diligence in his efforts to ascertain what information he should include in the December 2013 disclosure letter regarding the SRPD report. He conferred with multiple colleagues, superiors, and ethics attorneys, as well as Mr. Vercauteren about what needed to be included in the

[21] The first disclosure letter went out under Mr. Vercauteren' s signature and after his review. Although Mr. Vercauteren testified at trial in this matter that he did not have pre-trial knowledge of Officer Bartlett's resignation or the SRPD investigation, that testimony was inconsistent with other testimony he provided and with other evidence in the case, including the testimony of Detective Vasey. It remains unclear what, if any, information about any of the prosecution's pre-trial knowledge about Officer Bartlett's difficulties Mr. Vercauteren imparted to those being consulted about the disclosure letter.

letter. They were provided with the investigative report regarding Officer Bartlett and apparently a decision was ultimately made not to provide the report but only a letter disclosing certain aspects of it. The Court believes that Respondent acted with appropriate diligence in providing his supervisors with the report, seeking the input and guidance of multiple individuals regarding what to include in the disclosure letter and what did not need to be included to satisfy any obligation of disclosure, and by circulating the draft for approval by individuals other than himself.

The June 2014 Disclosure Letter

After defense counsel sent a letter inquiring about whether Bartlett had been engaged in two separate affairs with the victim's sisters, Respondent went to his supervisor at DOJ, Kim Dammers, for advice. Ms. Dammers provided feedback for a second disclosure letter after she reviewed the report. She suggested including that when Bartlett was confronted about his affair, he had lied. Respondent and Mr. Vercauteren drafted a second disclosure letter which stated,

> "The information received from the Salt River Police Department is that Officer Bartlett had a relationship with one individual, not two, who is an aunt of a shooting victim, Darcy Loring, Jr. Officer Bartlett admitted the relationship when asked by his supervisor and stated that it was over, but later acknowledged that the relationship continued after he told his supervisor it was over."

Respondent's draft response fairly addressed and responded to the specific inquiry made in Mr. Rodriguez's letter, and in addition disclosed Officer Bartlett's dishonesty about the relationship after being asked about it by his supervisor. Respondent conferred with Ms. Dammers and Mr. Vercauteren in conjunction with drafting it. Mr. Vercauteren ultimately approved it without substantive change. The Court does not find that in drafting the June 2014 letter, Respondent failed to exercise the reasonable diligence in representing his client that Rule 1.3 requires.

Finally, as it pertains to Petitioner's first contention that the letters do not disclose that Officer Bartlett was placed on administrative leave pending the investigation, the Court agrees that the letters do not, in fact, mention this. The question therefore becomes whether failing to include this fact demonstrated a lack of required diligence.

In light of the other information provided in the letters, the fact that Officer Bartlett was placed on administrative leave pending the investigation is not material. The December 2013 letter discloses that Officer Bartlett resigned before trial and before the investigation was completed. It also invited defense counsel to call the U.S. Attorney if he would like any additional information.

The disclosure letters were otherwise drafted through a reasonably diligent process involving multiple supervisors, at least one of whom (Mr. Jaffe) was a recipient of Respondent's September 30, 2013 email and apparently did not recall it either.

It is also not without significance, that Mr. Vercauteren, who had a copy of the Report and reviewed Respondent's draft and ultimately signed the final version of the letter, had knowledge that Officer Bartlett was on administrative leave and subsequently resigned pending the results of the ongoing SRPD investigation and could have, himself, inserted that into the draft before it was finalized but did not.

One could argue that the entire report should have been provided in lieu of or a supplement to the disclosure letters. To the Court, in hindsight, this might have been the easier path to take and might have avoided a lot of the controversy that arose. Given that the report discusses details of the investigation of three other officers who were not related to the ESB case and that many of the facts discussed in the Report reference cases unrelated to the ESB case, the Court is not convinced that the decision to reference portions of it in the disclosure correspondence instead of providing it in its entirety amounts to a violation of the requirement of reasonable diligence on the part of Respondent. Respondent was in the position of working with people from a different office and deferred to that office's practices. Mr. Vercauteren testified, "I wasn't sure what to do with [the Report]. That's why I sought advice from people above me that were in a better position to tell me what to do with it. I didn't know . . . because I had never been in this position before." **Tr. 16: 133.** While relying on the advice of others does not excuse otherwise impermissible conduct, the Court does not find that non-inclusion of the information in the first or second disclosure letters that Petitioner asserts should have been included amounts to a failure on the part of Respondent to act with reasonable diligence required by Rule 1.3.

AZRPC Rule 1.4. Communication.

Rule 1.4 provides, in part:

(a) A lawyer shall:
(3) keep the client reasonably informed about the status of the matter;
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Petitioner contends the Respondent violated Rule 1.4(a)(3) and (b) when he concealed his pre-trial knowledge that Officer Bartlett resigned pending an internal investigation and failed to inform the Government that the disclosure letters to defense counsel, the response to Denicio's motion for new trial, and the response brief filed in the Ninth Circuit contained numerous misrepresentations regarding the Government's pre-trial knowledge. For reasons discussed in connection with the Court's consideration of the alleged violation of Rule 1.3 as it pertains to the December, 2013 disclosure letter, the Court does not believe the Petitioner has established by clear and convincing evidence that the Respondent's conduct was violative of Rules 1.4(a)(3) and (b) dealing with obligations of client communication. For reasons previously discussed, the Court does not find that Respondent intentionally concealed from his client any pre-trial knowledge about Officer Bartlett's resignation pending internal investigation before or during the trial.

Non- disclosure of pre-trial knowledge in connection with Disclosure Letters, Response to new trial motion and appellate brief.

Petitioner next argues that Respondent violated Rule 1.4 by failing to inform the Government (i.e. his supervisors and the USAO supervisors) that the disclosure letters to defense counsel, the response to the motion for a new trial, and the response brief filed in the Ninth Circuit contained numerous misrepresentations regarding the Government's pre-trial knowledge. This question turns on whether Respondent knew that the Government had pretrial knowledge at the time of his participation in the preparation of these documents. For reasons previously discussed, at the time he was working on the disclosure letters to defense counsel, he did not recall that he had any pre-trial knowledge concerning Officer Bartlett's resignation pending investigation. As mentioned, apparently, neither did others to whom he had sent his September 2013 email. [22]

The Court feels compelled to add that it believes it to be more likely so than not so that, rather than being intentionally concealed from his supervisors and omitted from the December, 2013 disclosure letter with nefarious motive, the non-inclusion of his pre-trial knowledge in the draft of the disclosure letter to Mr. Rodriguez was due to his lack of recollection at that time (i.e., the time he was working on the drafts of the December disclosure letter). The Court finds that Respondent's attitude toward

[22] It is notable that Respondent's September 30, 2013, email was sent to James Trusty, David Jaffe, Kim Dammers, and Thomas Ott. In connection with the disclosure letters and/or the response to the motion for new trial, Respondent sought advice from his supervisors, Ms. Dammers and Mr. Jaffe, both of whom were recipients of the email.

disclosure in general is captured in the comment to Mr. Vercauteren accompanying transmittal of his draft of the letter:

> "I also included the part about the woman being related to a different victim in the case even though I think it is totally irrelevant. I just think in discovery issues it is always better to overdisclose. If you (or your chain) think that is a bad idea or inappropriate, then I am fine with you taking that part out."

Pet. Ex. 32.

Overall, consistent with this comment and with the testimony of his character witnesses, Respondent impresses the Court as being a prosecutor of diligence, integrity and honesty, who recognizes and appreciates the importance of prosecutorial disclosure.

Whether Respondent was aware of the team's pre-trial knowledge when he submitted his response to the motion for a new trial and his response brief filed in the Ninth Circuit is in a matter of dispute. The Court credits Respondent's testimony that at no time prior to his OPR interview did he recall having pre-trial knowledge that Officer Bartlett had resigned pending internal investigation. He did not communicate what he did not recall.

In support of its contention that Respondent did recall pre-trial knowledge of Officer Bartlett's resignation and the pending investigation when he was working on the reply to the motion for new trial, Petitioner references its Exhibit 39, which transmits a draft of the brief and seeks Mr. Vercauteren' s input regarding footnote 3.

In the covering email of June 27, 2014, Respondent writes "Also, we need to settle on what info to include in footnote 3". Footnote 3 of the draft response to the motion for new trial reads, "Briefly characterize what we knew prior to December here?" The Petitioner asserts this is sufficient to confirm that at the time he was working on the reply, Respondent knew he had pre-trial knowledge of Officer Bartlett's resignation and the pending investigation. However, the Court reads this footnote as a question from Respondent to Mr. Vercauteren, asking him what, if anything, Mr. Vercauteren knew, prior to December that should be imputed to the Government and included in the response. He testified that Mr. Vercauteren sent him back boilerplate language on *Brady* and imputed knowledge law and the supportive facts he wanted included instead. **Tr. 15: 62, 64.**

As well, the Court is not clearly convinced that Respondent recalled any undisclosed pre-trial knowledge when working on the appellate brief. In email correspondence of May 30, 2016, **Pet. Ex. 81** sent by Respondent to Ms. Wallbaum, Respondent asks Ms. Wallbaum whether they should include in the brief a reference to Officer Bartlett's trial testimony that he was no longer with the SRPD. Respondent wrote, "Don't want it to appear we hid that fact and of lesser importance defense at least had knowledge of that." This references Officer Bartlett's trial testimony, which is consistent with the evidence that on the day of his testimony, shortly before he took the stand, Mr. Vercauteren informed Mr. Rodriguez that Officer Bartlett was no longer with the SRPD. The email does not clearly and convincingly establish that Respondent recalled that he had any knowledge beyond that when working on the brief. If anything,

it indicates Respondent's recognition about the importance of disclosure, a fact consistent with his email regarding what to include in the disclosure letters (i.e.,"… it is always better to overdisclose").

Respondent testified at trial, "I am not a prosecutor to lie and fabricate things, and that this is a mistake, and I disavow any allegation that I was deliberately dishonest related to this matter." The Court believes Respondent and finds that while working on the reply to the motion for new trial and on the appellate brief, he did not have a recollection that Officer Bartlett resigned pending an internal investigation.

This case is distinguishable from the Supreme Court of Wyoming case which Petitioner cites, *Board of Professional Responsibility v. Argeris*, 341 P.3d 1030 (Wyo. 2014). There, the lawyer made intentional misrepresentations to the court. In accord, there are a plethora of cases in Maryland and Arizona which deal with a lawyer having present knowledge of a fact and either failing to communicate that fact to the client or mispresenting the fact. *See Attorney Grievance Comm'n v. Mitchell*, 445 Md. 241 (2015) (finding that lawyer failed to keep client reasonably informed by not telling the client that that the lawyer stipulated to a dismissal of the case); *Attorney Grievance Comm'n v. London*, 427 Md. 328 (2012); *Attorney Grievance Comm'n v. Webster*, 402 Md. 448 (2007) (finding that lawyer violated Rule 1.4 by deliberately lying to his client about filing a petition when he had not); *In re Varbel*, 897 P.2d 1337 (Ariz. 1995) (finding a violation when attorney who knew of a settlement offer failed to convey it to the clients). In the case at bar, the Court does not find that Respondent's conduct amounted to deliberate misrepresentation or concealment. Instead, the Court believes

that Respondent made an unintentional omission because at the relevant times, he did not have memory of it.

In furtherance of its argument that Respondent violated Rule 1.4, Petitioner asserts that Respondent did not inform his client that the disclosure letters to defense counsel omitted and mischaracterized certain information from the SRPD investigation report. It is unclear how Petitioner can maintain that Respondent violated his communication obligation in the manner asserted when his client, the Government, had the report itself and, in addition, had and reviewed both of the disclosure letters prior to them going out under Mr. Vercauteren' s signature. With the Report in hand, Respondent's client, the Government, reviewed it, and directed, authorized and approved of the content and characterizations of the information from the Report that were included in the disclosure letters. Petitioner's contention in this regard is therefore untenable.

In sum, the Court concludes that Petitioner did not meet its burden of establishing that Respondent violated Rule 1.4 on the basis of any of the arguments it asserted.

AZRPC Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the attorney

Petitioner alleges that Respondent violated Rule 3.3 by knowingly making "misrepresentations by omission" to the United States District Court for the District of Arizona in the Government's Response to the motion for a new trial—that is, Respondent failed to disclose in the Response that prior to trial, the trial team was aware that Officer Bartlett resigned pending an internal investigation. Petitioner alleges these actions were intended to mislead the Court. Petitioner also alleges that Respondent made knowing and intentional misrepresentations as well as misrepresentations by omission to the United States Court of Appeals for the Ninth Circuit in the Government's Response Brief—specifically that Respondent intentionally failed to disclose that the trial team was aware that Officer Bartlett resigned from the SRPD pending an internal investigation and that this omission was intended to mislead the Court. It argues that Respondent "deliberately omitted his pre-trial knowledge." Respondent's defense to the asserted violation of this rule is centered around the contention that "knowledge' is a required element of the rule and that Petitioner failed to establish that Respondent "knowingly" or deliberately made any false statement or failed to correct a false statement. Respondent maintains that any omission or failure to correct, was due to his lack of recollection.

In disciplinary actions, to prove that a respondent acted with dishonesty, misrepresentation, or deceit, it must be proven that his actions were intentional. *Attorney Grievance Comm'n v. Clements*, 319 Md. 289, 298 (1990); *see also Attorney Grievance Comm'n v. Lee*, 393 Md. 385, 410 (2006); *Attorney Grievance Comm'n v. Mooney*, 359 Md. 56, 78 (2000). As pointed out by Petitioner, concealing information from the court is "tantamount to knowingly making a false statement of material fact to the tribunal." *In re Alcorn*, 41 P.3d 600, 611 (Ariz. 2002). *In re Alcorn* affirms that a lawyer cannot remain silent when he knows his silence misleads the Court. *Id.* at 611.

The Court finds that Respondent had forgotten any pretrial knowledge of Officer Bartlett's resignation by the time of trial, during trial, and after trial while drafting his answer to the motion for the new trial and appellate brief. He did not recall his pre-trial knowledge of Officer Bartlett's resignation and pending investigation until being shown his September 30, 2013 email at his OPR interview. Accordingly, the Court concludes that he did not knowingly or intentionally withhold this information from the trial court in connection with either the trial of the ESB case, the government's response to the motion for new trial or its brief in the Ninth Circuit. Any mistake made in forgetting information was unintentional and not therefore a violation of Rule 3.3.

Case law is clear that a reasonable mistake in forgetting a fact does not amount to a violation of an ethical rule that includes the requirement that an action be committed "knowingly". In *Maryland v. Moore*, 451 Md. 55 (2017), the court discussed the requirements of knowingly making a misrepresentation in the context of Rule 8.1, but its discussion is relevant to Rule 3.3, the violation of which requires the lawyer to

knowingly make a false statement or knowingly fail to correct a statement. In *Moore*, the court stated,

> "[a]lthough Respondent should not have relied upon his memory of the events in drafting his Response to Bar Counsel, we find such conduct to amount to, at most, a negligent misrepresentation of the facts. Nothing in the records rises to the level of clear and convincing evidence that Respondent knowingly misrepresented the facts to Bar Counsel."

***Id.* at 85.**

Similarly, in *Mooney*, the court found there was a lack of evidence that an attorney violated Rule 8.1 when he represented to Bar Counsel that he believed he had assigned a case to his associate when in fact the associate had not been assigned the case. The court found that the evidence was not clear "to conclude that respondent intended to mislead the bar investigator." 359 Md. at 79. Petitioner cites *In re Fee*, 898 P.2d 975 (Ariz. 1995), in support of its position but that case involved a lawyer who was disciplined for knowingly, rather than inadvertently or mistakenly, failing to disclose a fact out of fear that disclosing would result in losing a settlement agreement, so it is distinguishable.

AZRPC Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

Petitioner argues that Respondent unlawfully obstructed the Defendants' access to the information he knew about Officer Bartlett's departure from SRPD by failing to disclose it before or during trial. The Court has determined that Respondent did not intentionally withhold evidence. It therefore concludes that he did not violate Rule 3.4. *See In re Shannon*, 876 P.2d 548, 560 (Ariz. 1994) ("All of the ethical rules in question—3.3, 3.4(a), 3.4(b) and 4.1—expressly or impliedly require some sort of knowledge on the part of the attorney. The factual development that resulted in the violation of ER 3.3 was that Respondent submitted the interrogatories to the court *after* learning that Client A was disclaiming the answers.... Given the conflicting testimony presented, we cannot say that there is clear and convincing evidence that Respondent knew that the answers he submitted did not represent Client A's position when he sent them to opposing counsel."); *Attorney Grievance Comm'n v. Dyer*, 453 Md. 585 (2017) ("This is not a case where Respondents intentionally sought to obstruct Normandy's access to evidence or failed to make reasonably diligent efforts to comply with legally proper discovery requests."); *Attorney Grievance Comm'n v. Smith*, 405 Md. 107 (2008) (finding that Respondent did not violate Rule 3.4 because he did not intentionally misrepresent that an arrest warrant at been issued).

Petitioner relies on a violation of Rule 3.8 (Special Duties of a Prosecutor) to establish the "unlawfully" element of Rule 3.4. As with Rule 3.4, Rule 3.8 contains an intent requirement -- that the undisclosed evidence be "known to the prosecutor." Respondent's lack of recollection at the times in question does not amount to a knowing and intentional violation of Rule 3.8 such that any asserted violation of Rule 3.8 also is to be considered a violation of Rule 3.4.[23]

AZRPC Rule 3.8. Fairness to Opposing Party and Counsel.

Rule 3.8 provides, in part:

> The prosecutor in a criminal case shall:
> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

The disclosure requirements of Rule 3.8(d) are 1) timeliness;[24] 2) actual knowledge; and 3) materiality or favorability. As Respondent did not recall any pretrial knowledge he had about Officer Bartlett's departure, before trial, during trial, when he was working on the response to the motion for new trial and on the brief, and because he did not recall it until shown his email in the OPR hearing, the Court concludes he

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[23] Additionally, Petitioner failed to prove that Respondent's conduct before or during the trial constituted a *Brady* or *Giglio* violation. Accordingly, the Court does not conclude that Respondent unlawfully obstructed access to evidence as required by Rule 3.4.

[24] As to the element of timeliness, prosecutors have an obligation to timely disclose to the defense, even after a trial has concluded, information which "clearly exculpatory" or which "casts doubt on the correctness of the conviction." *Canion v. Cole*, 115 P.3d 1261, 1264 (Ariz. 2005); *See Imbler v. Pachtman*, 424 U.S. 409, 427, fn. 25 (1976).

did not have actual knowledge of the relevant information at the time his disclosure obligation arose and did not withhold information "known to the prosecutor" as Rule 3.8(d) requires. The Court finds that the Petitioner has failed to meet its burden of proving by clear and convincing evidence all that is required to meet the elements of a Rule 3.8(d) violation in this case.

An interesting issue posed by this asserted violation is whether the prosecutor's obligation under this rule to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense" is coterminous with a prosecutor's obligations under *Brady,* or whether the obligations imposed by this rule are broader than the requirements of *Brady*.

The Court has previously ruled that it is not in a better position than Judge Campbell to determine whether *Brady* was violated and that in the case at bar, Petitioner did not establish a violation of *Brady* because it failed to establish, by clear and convincing evidence, that pre-trial non-disclosure of information about Officer

Bartlett's resignation and pending SRPD investigation was sufficiently material[25] as to be required by *Brady.* In other words, Petitioner did not prove that had the information that Officer Bartlett resigned pending internal investigation been provided to the defense in the ESB case, the outcome of the case would have been different. If Rule 3.8(d)'s requirements are coextensive with *Brady,* then consistent with the Court's prior ruling, Petitioner has not established a violation of Rule 3.8(d).

Petitioner, however, argues that Rule 3.8(d) requires more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure such as those established in *Brady*. It argues that regardless of whether Respondent was required by *Brady* to do so, Respondent violated Rule 3.8(d) by failing to disclose to the defense before or during trial that Officer Bartlett resigned from the SRPD pending an internal investigation.

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[25] The Supreme Court in *United States v. Giglio* provided its analysis of materiality of impeachment evidence: "Here, the Government's case depended almost entirely on Taliento's testimony; without it, there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Id.* at 155. Evidence is material under *Brady* "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449 (2009): *See generally Giglio v. United States*, 405 U.S. 150, 155 (1972) (discussing the obligation to disclose impeachment evidence as long as the reliability of a witness is determinative of guilt or innocence): *See also State v. Williams*, 392 Md. 194, 210 ("[U]nder *Giglio*, when the reliability of a witness is determinative of guilt or innocence, nondisclosure of such evidence falls within *Brady*.").

In support of its position that the requirements of Rule 3.8(d) are broader than the requirements of *Brady*, Petitioner cites an opinion by the American Bar Association's Standing Committee on Legal Ethics and Professional Responsibility, which, Petitioner points out, expressly disavowed the "incorrect assumption" that Rule 3.8(d) "requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure." ABA Comm. On Ethics and Professional Responsibility, Formal Op. 09-454 (2009) (hereinafter "ABA Opinion"). Petitioner also refers to the Supreme Court case of *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) which states, *inter alia*, that "the rule in [*Brady*] requires less of the prosecution than the ABA Standards for Criminal Justice [and 3.8(d)]."

States, however, are split over whether Rule 3.8 requires a prosecutor to disclose favorable evidence that is not necessarily "material" under Brady. As noted in *In re Kline*, 113 A.3d 202 (D.C. 2015), "[o]nly a few states have been forced to grapple with this specific issue." *Id.* at 210. Some states have ruled that the ethical obligations of prosecutors under Rule 3.8 are the same as their constitutional obligations. Other states have ruled that Rule 3.8 imposes broader requirements on prosecutors than their constitutional obligations under *Brady* and *Giglio*. "The question of whether and, if so, when a prosecutor's ethical and constitutional duties to disclose potentially exculpatory information to a defendant intersect continues to be a topic of much debate throughout the country." *In re Kline,* 113 A.3d at 206.

The 2009 ABA Opinion relied upon by the Petitioner, "has not been universally adopted [and] indeed, it has received some pointed criticism." *In re Riek*, 834 N.W.2d

384, 390 (Wis. 2013). Several jurisdictions have issued opinions criticizing it and have adopted rules which differ from it. In the case of *In re Riek, supra,* Wisconsin declined to adopt the recommendation in the ABA Opinion, noting that a more expansive reading of Rule 3.8 "would impose inconsistent disclosure obligations on prosecutors" and could lead to situations in which a prosecutor might fully comply with his or her obligations under the U.S. Constitution, but still be found in violation of an ethical rule. ***Id.* at 390**. The court further stated that, "[u]nder conflicting standards, prosecutors would face uncertainty as to how to proceed and could face professional discipline for failing to disclose evidence even when applicable constitutional law does not require disclosure of the same evidence." The court noted, "[d]isparate standards are likely to generate confusion and could too easily devolve into a trap for the unwary." ***Id***. It also observed that the practical effect of imposing such a rule would effectively expand the scope of discovery currently required and invites the use of the ethical rules as tactical weapons in litigation. ***Id.* at 390-91**. "What better way to interfere with law enforcement than to threaten a prosecutor with a bar complaint?" ***Id.* at 391.**

Other states which have ruled similarly to Wisconsin, include Ohio, Louisiana, Colorado, Oklahoma, and Tennessee. *See In re Petition to Stay Effectiveness of Formal Ethics Opinion* 2017-F-163, 582 S.W.3d 200 (2019); *In re Seastrunk*, 236 So.3d 509 (La. 2017); *State ex rel. Okla. Bar Ass'n v. Ward*, 353 P.3d 509 (Okla. 2015); *Disciplinary Counsel v. Kellog-Martin*, 124 Ohio St.3d 415 (2010); *In re Attorney C*, 47 P.3d 1167 (Colo. 2002). Additionally, North Carolina has aligned its rules to require disclosure of "all evidence or information required to be disclosed by applicable law,

rules of procedure, or court opinions," arguably indicating that the disclosure obligation is no greater than that required by the court opinion in *Brady*. *See* N.C. Rules of Prof'l Conduct 3.8(d) (2012).

Some states have ruled, consistent with the Petitioner's position and the ABA Opinion, that Rule 3.8 imposes greater duties on prosecutors than the U.S. Constitution. These jurisdictions include Utah, North Dakota, and Massachusetts. *See In re Larsen*, No. 20140535, 379 P.3d 1209 (Utah 2016); *In re Disciplinary Action Against Feland*, 820 N.W.2d 672 (N.D. 2012); Mass. R. Prof. C. Rule 3.8, cmt. 3A. Virginia and Tennessee have also issued Ethics Opinion imposing similar rules. *See* N.Y. State Bar. Ass'n Comm. On Prof'l Ethics, Formal Op. 2016-3 (2016); Va. State Bar Comm. On Legal Ethics Op. 1862 (2012).

The District of Columbia initially aligned its ethical rules with the constitutional obligations, but later determined that "it makes little common sense to premise a violation of an ethical rule on the effect compliance with that rule may have on the outcome of the underlying trial, because there can be 'no objective, *ad hoc* way' for a

prosecutor to 'evaluate before trial whether [evidence or information] will be material to the outcome.'"[26] ***In re Kline*, 113 A.3d at 208.**

The ABA Opinion 09-454, relied upon by the Petitioner broadly recommends that all "information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome" be disclosed. Petitioner argues that the *Brady* "material-to-outcome" test is absent from Rule 3.8(d) which requires disclosure of favorable evidence "without regard to the anticipated impact of the evidence on a trial's outcome" citing the ABA Opinion at page 4.

Elsewhere the Opinion states, "[E]vidence or information ordinarily will tend to negate the guilt of the accused if it would be relevant or useful to establishing a defense or negating the prosecution's proof. Evidence and information subject to the rule includes both that which tends to exculpate the accused when viewed independently and that which tends to be exculpatory when viewed in light of other evidence or information known to the prosecutor."

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[26] Compare D.C. Rules Prof'l Conduct R. 3.8 cmt 1 (2012) (noting that the Rule "is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure."), with *In re Kline*, 113 A.3d 202, 208-09 (D.C. 2015). However, in making this determination, D.C. relied on the demonstrative legislative intent to differentiate the rules as demonstrated by the fact that D.C. is perhaps the only state that included an intent requirement in Rule 3.8—it requires that a prosecutor intentionally withhold evidence. Nevertheless, under these states, prosecutors are required by Rule 3.8 to disclose all "potentially exculpatory evidence." *See In re Kline*, at 213.

It states further that,

> "In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt . . . The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use."

The ABA Opinion and the cases in accordance with it are not without persuasive force, but criticism of the opinion is also understandable. The words used in the opinion to describe the obligation imposed by the rule are much broader than the wording of the rule itself. Had the drafters of the appliable Arizona Rule of Professional Conduct intended to have it impose an obligation to disclose all "information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome" it could have said so but did not. Instead, it chose the words "evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."

Arizona does not appear to have a reported case addressing the issue although it is clearly the authority to which deference should be given when interpreting its own Rule of Professional Conduct. Because this Court has been called upon to decide the applicability of AZRPC 3.8 to the facts of this case, it will do so, recognizing the lack of precedential value or deference to be given to its ruling.

The State Bar of Arizona has issued a non-binding advisory ethics opinion on the matter, siding with those states that determined that Rule 3.8 imposes broader obligations on prosecutors. See Ariz. State Bar Ethics Op. 94-07. Even though the opinion is non-binding[27], given the apparent lack of any binding Arizona authority, it should be given weight in determining the interpretation to be given to AZRPC 3.8.

The Opinion states that inclusion of the phrase "evidence or information that tends to negate guilt" as indicative of an intention that the admissibility of *Brady* material is not determinative of a prosecutor's disclosure obligations. (Ethics Opinion at page 3).

The Opinion contains the dissent of one committee member, who wrote:

> "The issue which is of considerable concern to me is the proposal that Ethical Rule 3.8(d) is not coextensive with the Constitution. Such an opinion would confer greater rights to defendants than the Constitution does and has the effect of creating a super-exclusionary rule. It would be elevating the opinions of this committee and the Ethical Rules above decisions of the Supreme Court of Arizona and the Supreme Court of the United States, with the power to create substantive rights for defendants not existing in the Constitution. This is not within the province of this committee; and it may well be a violation of the separation of powers doctrine of the Constitution (See, U.S. v. Simpson, 927 F.2d 1099, 1090-1091 (9th Cir. 1991)); and a violation of the Supremacy Clause of the United States Constitution if applied to federal prosecutors. See, Baylson v. Disciplinary Board of Supreme Court of Pa., 975 F.2d 102, 111-113 (3rd Cir. 1992).

[27] The opinion contains concluding language that "Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings."

Additionally, the practical realities should be considered. What better way to interfere with law enforcement efforts than to threaten a prosecutor with a bar complaint? This weapon is certainly more effective than the existing exclusionary rule which merely excludes inadmissible evidence. One might expect that such an opinion would be used as a weapon by defense counsel to threaten that the government must now open its entire file despite the fact that the Constitution, as interpreted by the Arizona and United States Supreme Courts, does not require such a result. Prosecutors will be chilled by the thought of defending a bar complaint to the detriment of law enforcement.

As the Supreme Court of the United States, in establishing the requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), stated in United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985):

> An interpretation of Brady to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice." [Citation omitted.]
> Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interests in the finality of judgments.

105 S. Ct. at 3380, n.7."

The Non-Coextensive Approach

The Court has already indicated that if Rule 3.8 is to be read as being co-extensive with *Brady,* Petitioner has not met its burden of establishing a violation of the rule. To address the contingency that Rule 3.8 is not to be read as co-extensive with *Brady,* the Court will now address whether Respondent violated Rule 3.8 under the alternative "non-coextensive" interpretation of the Rule. As mentioned, that interpretation of the Rule does not hinge on whether the evidence was ultimately material to the case. Instead, that approach looks at whether the undisclosed evidence "tends to negate the guilt of the accused or mitigate the offense," which, beyond the plain meaning of the words, encompasses favorable evidence "without regard to the anticipated impact" in accordance with the ABA Opinion.

Analysis of Petitioner's Contentions under the Non-coextensive Approach

Petitioner argues that the disclosure letters "did not disclose the full extent of Officer Bartlett's misconduct, omitted material information including Officer Bartlett's false statements to his supervisor, and mischaracterized the information that Officer Bartlett provided to Ms. Tanner during their affair as "routine, but confidential." Extrapolating from more specific assertions set forth elsewhere in Petitioner's Proposed Findings, Petitioner's argument appears to be that the following facts were omitted: 1) that the Government knew of adverse information about Officer Bartlett prior to trial; 2) that there was information that Officer Bartlett provided to Ms. Tanner that cannot be characterized as "routine but confidential"; 3) that Officer Bartlett made multiple

false statements to SRPD; 4) Officer Bartlett misused SRPD resources to conduct an affair with Ms. Tanner; and 5) Officer Bartlett used his position to benefit Ms. Tanner. (See Petitioner's Proposed Findings at page 12).

The first assertion regarding Respondent's pretrial knowledge, has been thoroughly addressed and need not be addressed again in this section. If it had been recalled, disclosure of it might, in some fashion, be deemed favorable to the defense if the fact that Officer Bartlett had resigned and was under investigation provided permissible impeachment questioning, even if it was doubtful that it would tend to negate guilt or mitigate the offense.[28]

As it pertains to the second assertion, the Petitioner argues that the Government characterized the information Officer Bartlett told to Ms. Tanner as "routine, but confidential." However, that is not how the first disclosure letter reads. **Resp. Ex. 330.** The letter makes clear that the initial allegations against Officer Bartlett included that he provided routine, but confidential information to a community member and that the investigation ultimately concluded that Officer Bartlett had "released confidential reports, records or information to an unauthorized person [and] had established personal

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[28] *Vaughn v. United States*, 93 A.3d 1237, 1257-58 (D.C. 2014) (government had a duty to disclose the fact that a law enforcement witness was under an internal investigation if the information in the report is both "favorable and material"). Whether information is favorable is determined from a defense perspective, that is "of a kind that would suggest to any prosecutor that the defense would want to know about it." *Id.* at 1254. Favorable information includes impeaching information. *Id.* Under *Brady,* more than favorability is required. The materiality requirement must also be satisfied, that is, whether there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would be different. *Id.* at 1262.

relationships with known information sources." This tracks the section of the Report **Pet. Ex. 26**, which describes the details of the investigation and discusses that Officer Bartlett provided information to Ms. Tanner on a "friend to friend" basis, answered general questions regarding the contents of his day, and provided information to her in a similar way as would a spouse. The ultimate findings of the Report include the same language as the disclosure letter, to wit, that Officer Bartlett "released confidential reports, records or information to an unauthorized person" and established a "personal relationship[] with [a] known information source[]." Therefore, this portion of the disclosure letter is arguably not a mischaracterization, and the Petitioner has not established clearly and convincingly that it is.[29] The court is not satisfied that the omission would provide information to the defense that could be fairly characterized as qualitatively more favorable than that which is indicated in the letter.

Petitioner's third contention is that the letters fail to disclose that Officer Bartlett made multiple false statements to SRPD. Petitioner does not identify the statements to which this allegation refers but extrapolating from other portions of Petitioner's

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[29] The letter also states, "As you may recall, Bartlett provided mostly ministerial testimony." It then lists the tasks performed by Officer Bartlett to which the statement refers. The letter also characterizes Officer Bartlett's conduct as "unprofessional, but legal" and states that the Government ultimately does not believe the information to be material or admissible. These statements are clearly meant to convey the Government's opinion and position on the information, prefaced by words such as "I believe." The statements are consistent with the position that the Government ultimately reiterated in the Response to the motion for a new trial, that is, that the information was not material to the case. In the context of the letter, these statements are fairly characterized as opinions rather than statements of fact.

Proposed Findings, it appears Petitioner is referring to the portion of the Report which states that Officer Bartlett lied to his supervisor when he initially stated that the relationship was over and lied to his supervisor when he stated that he met Ms. Tanner alone in public places or with another officer present. The first statement that Officer Bartlett lied to his supervisor was included in the second disclosure letter, so it cannot be said that Respondent "failed to explain that the . . . June 2014 disclosure letter did not disclose . . . Officer Bartlett's false statements to his supervisor." Petitioner's Proposed Findings at page 25.

The contention, that Officer Bartlett lied when he told his supervisor that he met Ms. Tanner alone in public places, references that portion of the Report which states, "Officer Bartlett untruthfully told his supervisor the relationship was over. While continuing to be untruthful regarding his relationship, he would tell his supervisor he was meeting Ms. Tanner alone in public places or with another officer present due to policies governing information sources of the opposite sex." A plain reading of this section in the context of the full report, indicates that the second statement is describing how Officer Bartlett told his supervisor that the relationship was over and when faced with questions about why he was later meeting Ms. Tanner, untruthfully stated he is meeting her for work purposes. It does not strike the Court as misleading not to have included this description in the disclosure letters and to instead summarize this event as "Officer Bartlett admitted the relationship when asked about it by his supervisor and stated it was over, but later acknowledged that the relationship continued after he told his supervisor it was over." Arguably, this fairly discloses and characterizes Officer

Bartlett's dishonesty as described in the Report. It acknowledges that Officer Bartlett was untruthful, told his supervisor the relationship was over when it was not, and continued to pursue the relationship after he made that statement. Again, the Court is not satisfied that the asserted omission would provide information to the defense that could be fairly characterized as qualitatively more favorable than that which is indicated in the letter.

Petitioner argues that it was misleading to not have included in the disclosure letters the fact that Officer Bartlett misused SRPD resources to conduct an affair with Ms. Tanner. The Report discloses that Officer Bartlett used a work computer system to research Ms. Tanner and that he transported her in his work vehicle while off duty. There is no mention of these details in the disclosure letters. However, it is unclear how these details tend to "negate the guilt" of the defendants or mitigate their offenses. Disclosure of it might, in some fashion, be deemed favorable to the defense if the omitted facts provided permissible impeachment questioning, even if it was doubtful that it would tend to negate guilt or mitigate the offense.

Finally, Petitioner argues that it was misleading for the disclosure letters to not have included the fact that Officer Bartlett used his position to benefit Ms. Tanner. The Report states that he returned her purse to her during her arrest, while seizing the other arrestee's purse for evidence. Again, this shows Officer Bartlett's lack of good judgment and a violation of the departmental regulations, which again could be fodder for impeachment as it affects Officer Bartlett's integrity. It does not tend to show that the defendants did not commit RICO and VICAR crimes or that they should have had

a mitigated sentence. The defendants' guilt is not negated by the fact that during an unrelated arrest, Officer Bartlett provided preferential treatment to the woman with whom he was having an affair. While the woman was the aunt of one of the victims in the defendants' case, it was not clearly established that Officer Bartlett's preferential treatment of her during her unrelated arrest affected the defendants' case or undermined Officer Bartlett's testimony such that a failure to mention it in the disclosure letters amounts to a clear violation of Rule 3.8. However, since there is at least a colorable argument that these details could in some fashion be favorable to the defense, there is a basis under an expansive reading of Rule 3.8 that their omission breached the rule.

The Court has determined that under a reading of Rule 3.8 that is coextensive with *Brady,* Petitioner has failed to establish a violation of the Rule, particularly in light of the actual knowledge requirement of the Rule. Under an interpretation that is not coextensive, whether Respondent's omissions of information from the draft disclosure letter that Petitioner asserts should have been included amounts to a violation of the Rule is fairly debatable and thus unclear. However, even under a non-coextensive approach the Court is not satisfied that Petitioner has satisfied the actual knowledge requirement.

It seems worth noting that the court, in the previously cited case of *In re Kline,* determined that given the conflicting authority and confusion, and the prior uncertainty regarding the correct interpretation of a prosecutor's obligations under the rule, sanctioning the prosecutor for a violation of Rule 3.8 under the facts of that case would be unwarranted. ***See id.* at 204.**

Finally, although certainly not determinative of this Court's ruling, the Court believes the following language from the decision in Respondent's matter before OPR is significant:

> For the same reasons, OPR cannot conclude by a preponderance of the evidence that Vercauteren and Miller violated AZRPC 3.8(d), which requires disclosure of 'evidence or information that tends to negate the guilt of the accused or mitigates the offense.' While Arizona State Bar ethics opinion 94-07 suggests that the state bar rule may be broader than *Brady*, OPR did not find any court decisions holding that materiality was not an element of the Arizona rule.

Resp. Ex. 387 at Miller 002153.

AZRPC Rule 4.1. Truthfulness in Statements to Others

In its Proposed Findings of Fact and Conclusions of Law, Petitioner did not address, discuss, or present argument in support of the allegation that Respondent violated Rule 4.1 The Court therefore declines to address it.

AZRPC Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice.

Rule 8.4(a) requires proof that a lawyer violated or attempted to violate the Rules of Professional Conduct knowingly. Because this Court has determined that Respondent did not knowingly violate any other rule of Professional Conduct, it finds no violation of Rule 8.4(a).

Rule 8.4(c) requires clear and convincing proof that a lawyer engaged in dishonesty, fraud, deceit or misrepresentation. A violation of Rule 8.4(c) must be the result of intentional misconduct. *Attorney Grievance Comm'n v. Mungin*, 439 Md. 290, 310 (2014) ("It is well settled that this Court will not find a violation of M[L]RPC 8.4(c) when the attorney's misconduct is the product of negligent rather than intentional misconduct."); *Moore*, 451 Md. at 86 ("Because...we conclude that Respondent made a misrepresentation that was at most negligent, we hold that the record lacks clear and convincing evidence that Respondent violated Rule 8.4(c)."). Because this Court finds Respondent did not intentionally make false statements, intentional misrepresentations, or engage in conduct amounting to intentional concealment, the Court determines that he did not violate Rule 8.4(c).

Petitioner argues that Respondent violated Rule 3.8(d) when he "intentionally withheld exculpatory and impeachment evidence from the defense, and then repeatedly lied to the court, opposing counsel, and his colleagues to conceal his misconduct." The Court has thoroughly addressed each of those allegations throughout this Opinion and finds that Petitioner did not meet its burden of proof to establish them.

For these reasons, the Court finds that Respondent did not violate Rule 8.4.

The Court does not mean to convey that it subscribes to the notion that every professed lack of recollection will excuse a failure to disclose information that there is otherwise a duty to disclose. The Court's finding is limited to the particular facts of this case. Under the particular facts of this case, for the reasons stated, the Court concludes that Respondent's recollection of his pre-trial knowledge before being shown his September 30, 2013, email at his OPR hearing was not clearly and convincingly established. To the contrary, the Court found Respondent's contention about his lack of recollection to be credible. If, in another case, with different evidence and under different circumstances, a professed lack of recollection is clearly pretextual and disbelieved, a finding of violation of applicable disciplinary rules, even those requiring proof of knowledge and intent, would clearly be warranted.

Mitigating Factors

In *Attorney Grievance Comm'n v. Hodes*, the Court of Appeals stated that the following may be considered as mitigating factors:

> absence of a prior disciplinary record; absence of a dishonest or selfish motive; personal or emotional problems; timely good faith efforts to make restitution or to rectify consequences of misconduct; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; inexperience in the practice of law; character or reputation; physical or mental disability or impairment; delay in disciplinary proceedings; interim rehabilitation; imposition of other penalties or sanctions; remorse; and finally, remoteness of prior offenses.

Hodes, 441 Md. 136, 209 (2014) (internal citation omitted). The Court finds the following mitigating factors.

(1) Imposition of other penalties or sanctions. Respondent participated in an OPR review conducted by the US Justice Department, which after investigation into the matter, determined that the imposition of a six day suspension was appropriate. The Court also takes note that Respondent was cooperative and forthcoming in his OPR interview. When shown his September 30, 2013 email he acknowledged his mistake and did not attempt to evade responsibility. **Pet. Ex. 58, 160-63, 170, 172.**

(2) The absence of any prior disciplinary proceedings or record. Respondent has no prior disciplinary proceedings. In addition, though not binding on this Court, the Court takes note of the disposition of Respondent's matter by the Florida Bar Counsel. Respondent was notified by correspondence which reads as follows:

> "After viewing your letter, reading the transcript of the motion for a new trial, and understanding Judge Campbell's conclusions of law for denial of the new trial, discipline proceedings in this matter are not required. The evidence against Mr. Francisco was overwhelming more than 80 witnesses and Officer Bartlett's role and investigation appear to be corroborated through their other evidence and testimony. It is hard to see how disclosure of Officer Bartlett's inappropriate relationship with a relative of the victim would have been exculpatory. When in doubt, disclosure is always preferred, but you already know that. Your conciliatory letter bears that out. This matter is now closed pursuant to the Bar records retention policy. This matter will be disposed of one year from the date of closing.
>
> Sincerely, James Fisher, Bar Counsel."

Tr. 15: 88-89; and Resp. Ex. 400.

(3) The absence of a dishonest or selfish motive.

(3) Remorse.

(3) Full and free disclosure to disciplinary board and a cooperative attitude toward the proceedings.

(4) Physical or mental disability or impairment. During the relevant time period, Respondent was afflicted with serious medical conditions which impaired his memory and caused significant other complications which hampered his work on the already challenging, complex and lengthy case out of with these charges arise.

(5) Unlikelihood of repetition of the misconduct.

(6) Character or reputation. The Court heard from twelve individuals who have collectively known Respondent for decades in various capacities from college, law school, and work. ***See* Tr. 15: 139-45**. These include individuals who have known him for years: (Robert Baron, 26 years); **Tr. 15: 146-50** (Medford John Campbell, III, retired state trooper, 27 years); **Tr. 15: 151-55** (Douglas Belote, personal friend, 40 years); **Tr. 15: 156-68** (Shari Wilson, wife, 38 years); **Tr. 16: 7-14** (the Honorable Barbara Kerr Howe, 33 years); **Tr. 16: 41-48** (Paul Stancil, former colleague and criminal investigator, 21 years); **Tr. 16: 48-54** (Mary Rosewin Sweeney, former Maryland Attorney General colleague, 31 years); **Tr. 16: 115-17** (Keith Vercauteren, DOJ colleague, 8 years); **Tr. 17: 30-36** (Douglas Newhoff, personal friend, 41 years); **Tr. 17: 37-43** (Elizabeth Newhoff, personal friend, 39 years); **Tr. 17: 44-52** (Emmet Davitt, former colleague and retired State Prosecutor of Maryland, 31 years); **Tr. 17: 53-61** (Wayne Raabe, former DOJ supervisor, 15 years). The witnesses spoke of their personal and professional experiences with Respondent over the many years they have known him. Collectively they testified that Respondent was a person of high integrity and character. They described him variously as honest, trustworthy, respectful, fair, cordial, mannerly, bright, diligent, conscientious, reliable, honorable both personally and professionally, hardworking, thorough, extremely competent, a "straight shooter", an excellent attorney, above reproach and of unimpeachable character. Importantly, Respondent's character witnesses have never known him to be dishonest or deceitful in any way.

Aggravating Factors

The Court of Appeals has recognized the following aggravating factors that may be taken into account:

(1) Prior disciplinary offenses;
(2) A dishonest or selfish motive;
(3) A pattern of misconduct;
(4) Multiple offenses;
(5) Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
(6) Submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(7) Refusal to acknowledge the wrongful nature of conduct;
(8) Vulnerability of victim;
(9) Substantial experience in the practice of law; and
(10) Whether he or she displayed indifference to making restitution.

See Attorney Grievance Comm'n v. Sperling, 434 Md. 658, 676-77 (2013) (citing Standard 9.22 of the American Bar Association Standards for Imposing Lawyer Sanctions).

In the case at bar, the Court finds that Respondent has substantial experience in the practice of law, including particularly, in the area of federal criminal prosecutions which is the type of underlying action from which this matter arises. In light of that he was cognizant of the extent and importance of disclosure obligations involved in criminal prosecutions and the consequences which result from those obligations not being observed.

8/23/21
Date

JUDGE Kevin G. Hessler
Circuit Court for Montgomery County, MD